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# REINFORCING REPRESENTATION: CONGRESSIONAL POWER TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS IN THE REHNQUIST AND WAITE COURTS

Ellen D. Katz\*

## INTRODUCTION

A large body of academic scholarship accuses the Rehnquist Court of “undoing the Second Reconstruction,”<sup>1</sup> just as the Waite Court has

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1. See, e.g., J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 2, 67-68, 368 (1999) (arguing that *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny “threaten[] to reverse the course of minority political success during the Second Reconstruction”); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1097-99 (2001) (arguing that “in many ways, the constitutional vision of the conservative [members of the Rehnquist Court] resembles the interpretation of the Northern Democrats who were hostile to Reconstruction”); Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 859 (2002) (arguing that decisions by the Rehnquist and Waite Courts similarly restrict civil-rights laws); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 68 (1991) (describing the 1989 civil-rights decisions of the Supreme Court as “the equivalent of the Compromise of 1877, which ended the first Reconstruction”); Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 755 & nn.131-32 (1998) (arguing that the Rehnquist Court is “squarely at the forefront of 19th Century jurisprudence, adopting the rationales that were used to strike down the original post-Civil War Civil Rights Statutes”); John E. Nowak, *The Gang of Five and the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091, 1093, 1096 (2000) (stating that specific Rehnquist Court decisions reflect an “Anti-Reconstruction . . . ‘philosophy’ that has been adopted and imposed on our country by the Gang of Five” and arguing that “we are witnessing the return of an Anti-Reconstruction Supreme Court”); James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 561 (1999) (arguing that the end of the Second Reconstruction has resulted from “judicial intransigence” similar to that which ended the First); Pamela S. Karlan, *End of the Second Reconstruction? Voting Rights and the Court*, NATION, May 23, 1994, at 698, 700 [hereinafter Karlan, *End of the Second Reconstruction?*] (arguing that “the Supreme Court has relentlessly chipped away at the foundations of the Second Reconstruction”).

long been blamed for facilitating the end of the First.<sup>2</sup> This critique captures much<sup>3</sup> of what is meant by those generally charging the Rehnquist Court with “conservative judicial activism.”<sup>4</sup> It posits that the present Court wants to dismantle decades’ worth of federal antidiscrimination measures that are aimed at the “reconstruction” of public and private relationships at the local level.<sup>5</sup> It sees the Waite Court as having similarly nullified the civil-rights initiatives enacted by Congress following the Civil War to reconstruct the former Confederacy. And it maintains that both Courts’ willingness to invalidate federal statutes and limit congressional power evinces the view that much

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2. See sources cited *infra* note 36 and accompanying text.

3. But not all. See Balkin & Levinson, *supra* note 1, at 1045-51 (critiquing *Bush v. Gore*, 531 U.S. 98 (2000), as an example of conservative judicial activism); see also Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 582 (2002).

4. For claims that the Rehnquist Court engages in conservative judicial activism, see, for example, Balkin & Levinson, *supra* note 1, at 1081; Erwin Chemerinsky, *The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601, 602 (1998) [hereinafter Chemerinsky, *The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights*] (describing various federalism decisions as displaying “conservative judicial activism”); Scott Fruehwald, *If Men Were Angels: The New Judicial Activism in Theory and Practice*, 83 MARQ. L. REV. 435, 441 (1999) (stating that “the new judicial activism . . . employ[s] general notions of federalism that are not anchored in the Constitution’s words” and “ignore[s] some of its basic principles in certain cases [and] produce[s] results . . . that are unprincipled and even ideologically biased”); Steven A. Light, *Too (Color)blind to See: The Voting Rights Act of 1965 and the Rehnquist Court*, 39 GEO. MASON U. CIV. RTS. L.J. 1, 3 (1997-1998) (stating that “the convergence of judicial activism and ideological conservatism that characterizes the Rehnquist Court . . . suggests that the Second Reconstruction is at a turning point” (internal citation omitted)); Peter M. Shane, *Federalism’s “Old Deal”: What’s Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000); and Larry D. Kramer, *No Surprise. It’s an Activist Court*, N.Y. TIMES, Dec. 12, 2000, at A33 (arguing that “[t]he Rehnquist Court has been using law to reshape politics for at a least a decade” and that “conservative judicial activism is the order of the day”).

5. C. Vann Woodward coined the phrase “Second Reconstruction” in 1965 to describe a series of then-new federal civil-rights initiatives. C. Vann Woodward, *From the First Reconstruction to the Second*, HARPER’S MAG., Apr. 1965, at 127. The phrase is now understood to encompass a wide range of federal mandates and programs. See, e.g., KOUSSER, *supra* note 1, at 12-13 (describing 1982 Amendments to the Voting Rights Act as part of the Second Reconstruction); Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 161 (1998) (categorizing the Civil Rights Act of 1991 as “perhaps . . . [the] last reconstructive moment” of the Second Reconstruction); Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990*, at 378, 383-86 (Chandler Davidson & Bernard Grofman eds., 1994) (same); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 448 & nn.24-25 (2000) (describing the Americans with Disabilities Act (“ADA”), the Violence Against Women Act (“VAWA”), and the Freedom of Access to Clinic Entrances Act of 1994 as part of the Second Reconstruction); Michael J. Zimer, Taxman: *Affirmative Action Dodges Five Bullets*, 1 U. PA. J. LAB. & EMP. L. 229, 234 (1998) (stating that the Civil Rights Act of 1991 “revitaliz[ed] the Second Reconstruction”); see also NUMAN V. BARTLEY & HUGH D. GRAHAM, *SOUTHERN POLITICS AND THE SECOND RECONSTRUCTION* 19 (1975); MANNING MARABLE, *RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1990* (2nd ed. 1991).

federal civil-rights legislation represents an impermissible redistributive project and an unconstitutional interference with state and local autonomy.<sup>6</sup>

This Article argues that the critique that the Rehnquist Court is “undoing the Second Reconstruction” is too simple, but not only because it fails to account for last Term’s relatively “moderate” decisions.<sup>7</sup> A parallel indeed exists between the Rehnquist Court’s response to the Second Reconstruction and the Waite Court’s reaction to the First. Decisions by both Courts, however, respond to Reconstruction not with undifferentiated hostility, but instead in a more complex manner. This Article attempts to show that these decisions posit a two-tiered vision of Congress’s enforcement powers under the Reconstruction-era Amendments. Under this vision, Congress possesses broad discretion to free state political processes of racial discrimination,<sup>8</sup> but enjoys far more limited authority to combat other forms of discrimination at the state and local level.

This disaggregation of Congress’s enforcement powers may be understood to reflect the view that individual liberty is best protected at the state level, but only so long as the “healthy organization of the government itself” is maintained.<sup>9</sup> State government must represent “the free choice of the people,”<sup>10</sup> but racial discrimination in voting prevents States from fulfilling this function. Decisions by both Courts accord deference to congressional efforts to block such discrimination and thereby to reinforce representative governance at the state level. They countenance this broad congressional power in order to preserve the primacy of state authority elsewhere.<sup>11</sup>

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6. See, e.g., Balkin & Levinson, *supra* note 1, at 1052-61 (arguing that “[i]n the past ten years, the Supreme Court of the United States has begun a systematic reappraisal of doctrines concerning federalism, racial equality, and civil rights that, if fully successful, will redraw the constitutional map as we have known it”); Fruehwald, *supra* note 4, at 441; Nowak, *supra* note 1, at 1098 (stating that “the Gang of Five cannot disguise the fact that they have nothing but disdain for the federal system that our country adopted both in 1787 and following the Civil War”); Jed Rubenfeld, *The Anti Anti-Discrimination Agenda*, 111 YALE L.J. 1141, 1144 (2002) (stating that “some of the Court’s federalism cases are not really federalism cases at all”); see also Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002) (discussing elements thought to comprise conservative judicial activism).

7. See, e.g., *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); *Nevada Dep’t of Human Res. v. Hibbs*, 123 S. Ct. 1972 (2003); see also Tony Mauro, *A Timeout for Conservative Agenda*, LEGAL TIMES, June 30, 2003, at 1; Editorial, *A Moderate Term on the Court*, N.Y. TIMES, June 29, 2003, § 4, at 12 (stating “the highest court of all has surprised many people with its moderation”).

8. See *infra* Parts I & II.

9. *Ex parte Yarbrough*, 110 U.S. 651, 666 (1884); see also *infra* note 293 and accompanying text.

10. *Yarbrough*, 110 U.S. at 666.

11. See *infra* Part III.

The first two Parts of this Article seek to establish that decisions by both Courts defer more to congressional efforts to rid local political processes of racial discrimination than to other types of congressional antidiscrimination measures. These Parts do not argue that both Courts deliberately set out to recognize a special realm in which they would defer to congressional power and indeed take no position on the justices' subjective motivation on this point. Nor do they maintain that deference in this realm necessarily precludes deference to Congress in other arenas.<sup>12</sup> Instead, they locate within decisions by both Courts evidence that both defer considerably to Congress in the realm of race and the vote.

Part I discusses a series of Waite Court decisions that circumscribe congressional authority to enforce the Reconstruction-era Amendments. Scholars frequently cite *United States v. Reese*,<sup>13</sup> *United States v. Cruikshank*,<sup>14</sup> *United States v. Harris*,<sup>15</sup> and the *Civil Rights Cases*<sup>16</sup> as evidence of the Waite Court's resistance to the First Reconstruction's political project.<sup>17</sup> The Waite Court threw out federal indictments, opined unnecessarily on a host of constitutional questions, and invalidated federal enforcement legislation as falling outside congressional

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12. *Nevada Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972 (2003), for example, suggests that the Court may also defer to congressional efforts to combat gender discrimination. The scope of such a principle and the strength of the Court's commitment to it are as yet unclear. *Hibbs* holds that state employees may recover money damages in federal court if a state employer violates the family care provisions under the Family and Medical Leave Act ("FMLA"). *Id.* at 1976. States typically enjoy immunity from such suits, *see, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), and, in recent years, the Court has struck down congressional efforts to abrogate this immunity in statutes quite similar to the FMLA. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding unconstitutional attempted abrogation of state immunity in the ADA); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (same, for the Age Discrimination in Employment Act ("ADEA")). *Hibbs* accordingly surprised many observers by upholding the FMLA as a permissible exercise of Congress's power to enforce the Fourteenth Amendment. *See, e.g.*, David L. Hudson, Jr., *Court Surprises With Family Leave Act Ruling*, ABA J. E-REPORT, May 30, 2003, at 21 (quoting Nina Pillard, who argued for *Hibbs*, as stating that "[i]t certainly was the case that the smart money was on my opponents" and citing speculation that *Hibbs* had a "95% chance" of losing (internal quotation marks omitted)), available at LEXIS, ABA Library, ERPORT File. Denying any conflict with precedent, *Hibbs* insists that the heightened judicial scrutiny accorded to gender-based distinctions provides Congress greater leeway to craft statutes such as the FMLA than it enjoys when it targets discrimination against nonsuspect groups. *Hibbs*, 123 S. Ct. at 1982. That leeway, however, requires not only the targeting of gender-based discrimination, but also a statutory remedy that falls comfortably within Congress's commerce power. *See United States v. Morrison*, 529 U.S. 598 (2000) (rejecting congressional power to subject private parties to liability under the VAWA); *see also* Marcia Coyle, *Follow the People*, NAT'L L.J., Aug. 4, 2003, at S1 (noting tensions between *Hibbs* and *Morrison*).

13. 92 U.S. 214 (1876).

14. 92 U.S. 542 (1876).

15. 106 U.S. 629 (1883).

16. 109 U.S. 3 (1883).

17. *See* sources cited *infra* notes 36, 54.

authority. And yet the Court left open significant opportunities for Congress to reach deeply into local affairs to protect black-voting strength.<sup>18</sup>

Part II identifies a similar proclivity in a series of Rehnquist Court decisions that address Congress's power to frame antidiscrimination measures. *City of Boerne v. Flores*<sup>19</sup> circumscribes congressional power to enforce the Reconstruction-era Amendments.<sup>20</sup> *Boerne* and nearly all of its progeny<sup>21</sup> invalidate congressional statutes, exhibit a preference for state and local power over federal authority,<sup>22</sup> and evince a seeming antipathy to federal civil-rights initiatives and the social engineering they represent.<sup>23</sup> All the *Boerne* cases, however, self-consciously preserve precedent upholding provisions of the Voting Rights Act ("VRA") against constitutional challenge.<sup>24</sup> They do so notwithstanding the displacement of local autonomy that results from enforcement of the VRA's race-conscious antidiscrimination principles,<sup>25</sup> and the seeming doctrinal inconsistencies that exist between these cases and the *Boerne* doctrine.<sup>26</sup>

The Rehnquist Court's careful preservation of the VRA precedent becomes even more puzzling when juxtaposed with much of the Court's contemporary voting-rights decisions. The constitutional injury recognized in *Shaw v. Reno*<sup>27</sup> and its progeny<sup>28</sup> hinders the easy deployment of

18. See *infra* Part I.

19. 521 U.S. 507 (1997).

20. See Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127 (2001) [hereinafter Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers]; see also *infra* notes 118-123 and accompanying text (discussing the novelty of the *Boerne* holdings and their departure from precedent).

21. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999). The exception is *Nevada Dep't of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003). See *supra* note 12.

22. See *infra* notes 115-123 and accompanying text.

23. See, e.g., Post & Siegel, *supra* note 5, at 525; see also *infra* notes 115-123 and accompanying text.

24. The *Boerne* decisions preserve *City of Rome v. United States*, 446 U.S. 156 (1980); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); and *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). See *infra* notes 157-159 and accompanying text (discussing preservation of VRA precedent in *Boerne* decisions).

For a discussion of the history and structure of the VRA, see SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY*, 546-48, 556-57 (2d ed. 2001).

25. See *infra* notes 143-145 and accompanying text.

26. See *infra* notes 160-165 and accompanying text (discussing the doctrinal inconsistencies between the early VRA precedent and the *Boerne* decisions).

27. 509 U.S. 630 (1993).

28. *Easley v. Cromartie*, 532 U.S. 234 (2001); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995).

race-conscious districting practices.<sup>29</sup> Miserly readings of the VRA in several cases over the past decade accord Congress insufficient deference.<sup>30</sup> Read together, these decisions appear to manifest hostility to the VRA and to the larger federal project of which it is a central component.<sup>31</sup> And yet, as Part II argues, they do not disavow broad congressional power to block racial discrimination in voting. Instead, they reflect the Court's judgment that the United States Department of Justice ("DOJ") and state officials have relied too prominently and rigidly on race when regulating political processes and have misconstrued the VRA as providing authority to do so.<sup>32</sup>

Parts III and IV offer and evaluate an explanation for why decisions by both the Rehnquist and Waite Courts might recognize a distinctly broad congressional power to address racial discrimination in voting. The goal is not to establish subjective motivation, but instead to offer a conceptual framework grounded in decisional text that might explain the doctrinal path followed by both Courts.

Part III argues that decisions by both the Waite and Rehnquist Courts defer to congressional power in the realm of race and the vote as a means to reinforce representative governance at the state level. Implicit in these decisions is the conviction that state governments best protect individual liberty, and that only inclusive electoral procedures enable the State to perform this protective role. Fostering effective state governance is thought to render unnecessary more intrusive and extensive federal regulation, and thus most faithfully to comport with the federal structure.<sup>33</sup>

Part IV explores the limits of the Rehnquist Court's deferential stance toward Congress. The constitutionality of section 2 of the Voting Rights Act is currently an open question.<sup>34</sup> This Part argues that the Court should uphold its validity insofar as the deference it presently accords Congress reflects a functional understanding of congressional power to reinforce representation in the states. Nevertheless, the realm in which racial discrimination affects the political process is potentially vast, and numerous competing and controversial techniques are available to address such discrimination. Left unchecked, congressional power in this realm might easily become

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29. See *infra* notes 205-206 and accompanying text.

30. See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) [hereinafter *Bossier Parish II*]; *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) [hereinafter *Bossier Parish I*]; *Holder v. Hall*, 512 U.S. 874 (1994); *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992); see also *Abrams v. Johnson*, 521 U.S. 74 (1997); *infra* notes 221-225, 234-244 and accompanying text.

31. See *infra* Section II.B.

32. See *infra* notes 221-225 and accompanying text.

33. See *infra* note 276-277 and accompanying text.

34. See sources cited *infra* note 356 and accompanying text.

plenary over an immense range of conduct. Precedent suggests that the Rehnquist Court will not countenance such an expansion of congressional power. The Court may accordingly seek to cabin congressional authority by decreeing only limited conduct to be sufficiently voting-related to warrant congressional proscription. And, as *Bush v. Gore*<sup>35</sup> indicates, it may be willing to identify new substantive constitutional norms governing democratic structure. These norms, in turn, may curtail congressional discretion to regulate the political process. Such efforts may render section 2 invalid, and, more broadly, eliminate entirely the realm in which the Court presently defers to Congress. Were the Court to do so, it would indeed “undo” the Second Reconstruction.

## I. THE WAITE COURT AND THE ENFORCEMENT ACTS

The critique that the Rehnquist Court is undoing the Second Reconstruction evokes the longstanding assessment that the Waite Court contributed significantly to the end of the First.<sup>36</sup> Read together, decisions such as *United States v. Reese*,<sup>37</sup> *United States v. Cruikshank*,<sup>38</sup>

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35. 531 U.S. 98 (2000).

36. For this critique of the Waite Court, see, for example, HAROLD M. HYMAN & WILLIAM W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875*, at 488 (1982) (crediting the Waite Court with leading “the judicial retreat from Reconstruction”); RAYFORD W. LOGAN, *THE BETRAYAL OF THE NEGRO* 105-06 (enlarged ed. 1965) (noting role of Waite Court in the demise of Reconstruction); Davidson & Grofman, *supra* note 5, at 378 (characterizing “the complicity of the federal courts” as a necessary component of southern redemption); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1336-37 (1952) (describing Waite Court decisions along with the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), as a “[j]udicial [c]oup d’[e]tat” in which “the bold motives and the brave arguments of the architects of the constitutional revolution in civil rights were forgotten under the din of a judicial rewriting of their efforts”); and Karlan, *End of the Second Reconstruction?*, *supra* note 1, at 698 (arguing that during the 1870s and 1880s, “the Court gutted the First Reconstruction by invalidating or misconstruing a series of critical Congressional protections of black political and economic rights”). See also *infra* note 54 and accompanying text (discussing historians’ assessment of Reese and Cruikshank).

But see WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 148-85 (1988) (characterizing various decisions by the Waite Court as moderate and balanced); Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 63 (“[W]hat is remarkable is the degree to which the [Waite] Court sustained national authority to protect rights rather than the degree to which [it] restricted it.”); Earl M. Maltz, *The Waite Court and Federal Power to Enforce the Reconstruction Amendments*, in *THE SUPREME COURT AND THE CIVIL WAR* 75, 80-81 (Jennifer M. Lowe ed., 1996) (stating that “to describe the analysis of the Waite Court as unremittingly conservative would be a mistake” and arguing that the Court’s “jury discrimination and voting rights cases reflect sympathy for the major elements of the Republican theory of federal power”). Cf. Randall Kennedy, *Reconstruction, the Waite Court and the Politics of History*, in *THE SUPREME COURT AND THE CIVIL WAR*, *supra*, at 99, 102 (noting the revisionist argument that “far from betraying the political values of the Republicans who fashioned the Reconstruction Amendments, the Waite Court Justices rather faithfully mirrored those values”); *infra* notes 85-111 and accompanying text.

37. 92 U.S. 214 (1876).



*United States v. Harris*,<sup>39</sup> and the *Civil Rights Cases*<sup>40</sup> undeniably restricted congressional power to enforce the newly ratified Reconstruction-era Amendments. And yet, the Waite Court's resistance to congressional reconstruction was not steadfast. As *Reese* and *Cruikshank* make clear, the Waite Court did not hesitate to overturn federal convictions and invalidate congressional enforcement legislation. But even as it did so, the Waite Court left open opportunities for the exercise of broad congressional power to reach deeply into local affairs to block efforts meant to curb or eliminate black-voting strength.

At issue in *United States v. Reese* were federal indictments charging two municipal-election inspectors with violating sections 3 and 4 of the Enforcement Act of 1870.<sup>41</sup> The indictments alleged that the inspectors refused to accept payment of a poll tax proffered by an otherwise qualified black voter "because of [his] race."<sup>42</sup> Chief Justice Waite's majority opinion construes sections 3 and 4 of the 1870 Act to transcend race-based denials of the vote and to encompass wrongful denials of the vote more generally.<sup>43</sup> Based on this interpretation, *Reese* holds that the statutory provisions exceeded Congress's enforcement power under section 2 of the Fifteenth Amendment.<sup>44</sup> "Congress can interfere" in state elections, *Reese* states, only when a State "wrongful[ly] refus[es] to receive the vote of a qualified elector . . . because of race, color, or previous condition of servitude."<sup>45</sup>

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38. 92 U.S. 542 (1876).

39. 106 U.S. 629 (1883).

40. 109 U.S. 3 (1883).

41. In relevant part, section 3 provides that "the offer" of a citizen to carry out a state-mandated prerequisite to voting "be deemed and held as performance in law of such act" if the offer "fail[s] to be carried into execution by reason of the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance" and establishes a federal criminal offense for "any judge, inspector, or other officer of election . . . wrongfully [to] refuse or omit to receive, count, certify, register, report, or give effect to the vote of such citizen."

Section 4, in relevant part, establishes a criminal offense for "any person, by force, bribery, threats, intimidation, or other unlawful means . . . [to] hinder, delay, prevent, or obstruct, or . . . [to] combine and confederate with others to [do the same], any citizen from doing any act required to be done to qualify him to vote or from voting at an election as aforesaid." Act of May 31, 1870, ch. 114, §§ 3, 4, 16 Stat. 140-41, *repealed by* 28 Stat. 36, 37 (1894).

42. *Reese*, 92 U.S. at 216. *See generally* 2 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864-1888, at 229-30 (1987); ROBERT M. GOLDMAN, RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN REESE AND CRUIKSHANK 65-67 (2001).

43. *See Reese*, 92 U.S. at 218, 220.

44. *Id.*

45. *Id.* at 218.

*United States v. Cruikshank*<sup>46</sup> upholds the release of three white men convicted under section 6 of the 1870 Act<sup>47</sup> for their participation in the Grant Parish Massacre. Following the contested gubernatorial election in Louisiana in 1872, and the parallel governments it produced, a group of black Republicans assembled in Colfax to defend Republican control of the Grant Parish seat. On April 13, 1873, fighting broke out between these forces and white Democrats from the countryside. Two white men and dozens, and perhaps hundreds, of black men died. Many of the black men were killed after they surrendered to the white forces.<sup>48</sup> Federal prosecutors indicted ninety-nine of the white men involved, prosecuted nine, and obtained convictions against three. The trial judges, Circuit Judge Woods and Associate Justice Bradley, disagreed over the legality of the convictions, resulting in that court granting the defendant's motion to arrest judgment.<sup>49</sup>

*Cruikshank* holds that the indictments failed to charge an interference with "any right or privilege granted or secured" by the Constitution, as required by section 6. According to Chief Justice Waite's opinion for the Court, charges alleging interference with the victims' voting rights fell short because the indictments did not assert racial motivation.<sup>50</sup> Alleged deprivations of due process and equal protection failed because those Fourteenth Amendment guarantees did not "add any thing [sic] to the rights which one citizen has under the Constitution against another."<sup>51</sup> Alleged denials of the right to assemble and the right to bear arms were deficient because the Constitution guaran-

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46. 92 U.S. 542 (1876).

47. Section 6 of the 1870 Act provides:

That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provisions of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony . . . .

Act of May 31, 1870, Ch. 114, § 6, 16 Stat. 140, 141 (codified as amended at 18 U.S.C. § 241 (2000)).

48. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 530 (1st ed. 1988) (describing the massacre as the "bloodiest single act of carnage in all of Reconstruction"); GOLDMAN, *supra* note 42, at 42-50; ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at 175 (1985); TED TUNNELL, *CRUCIBLE OF RECONSTRUCTION: WAR, RADICALISM, AND RACE IN LOUISIANA 1862-1877*, at 189-92 (1984); XI WANG, *THE TRIAL OF DEMOCRACY* 135-37 (1997).

49. See *United States v. Cruikshank*, 25 F. Cas. 707, 708 (C.C.D. La. 1874) (No. 14,897).

50. See *United States v. Cruikshank*, 92 U.S. 542, 556 (1876) (noting that "[w]e may suspect that race was the cause of the hostility; but it is not so averred").

51. *Id.* at 554-55.

teed those rights only against congressional encroachment.<sup>52</sup> Other counts were simply too vague.<sup>53</sup>

According to scholars of divergent viewpoints, *Reese* and *Cruikshank* thwarted federal power to protect the southern black population and facilitated the end of Reconstruction.<sup>54</sup> The two decisions,

52. *Id.* at 552-53.

53. *Id.* at 557-58.

54. See, e.g., KEITH J. BYBEE, *MISTAKEN IDENTITY* 15 n.15 (1998) (stating that *Reese* and *Cruikshank* "guttled the enforcement acts"); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 179-80 (1986) (describing *Cruikshank* as holding that "the government could do nothing about a politically motivated armed attack by whites that killed sixty blacks" and that *Reese* "seriously restrict[ed] the power of Congress to protect blacks under the Fourteenth and Fifteenth Amendments"); JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM* 330-31 (3d ed. 1967) (arguing that *Reese* and *Cruikshank* "hasten[ed] the end of Reconstruction"); WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION 1869-79*, at 295 (1979) (stating that *Reese* "made future enforcement vastly more difficult, and in some cases clearly impossible"); HYMAN & WIECEK, *supra* note 36, at 488-89; ISSACHAROFF ET AL., *supra* note 24, at 90-91 (citing *Reese* and *Cruikshank* as decisions that "eviscerated various federal protections of black voting rights" and thus as evidence of the Court's "pivotal role" in disenfranchisement); KACZOROWSKI, *supra* note 48, at 217; RICHARD KLUGER, *SIMPLE JUSTICE* 60-61 (1975) (stating that *Reese* "made the federal guarantee of the right to vote all but worthless" and that *Cruikshank* "doubled the strength of the Court's blow"); KOUSSER, *supra* note 1, at 49-50 (citing *Reese* and *Cruikshank* as evidence of the Supreme Court's "poten[cy] in protecting white supremacy in the late nineteenth century"); C. PETER MAGRATH, MORRISON R. WAITE: *THE TRIUMPH OF CHARACTER* 132 (1963) (noting that *Reese* and *Cruikshank* "arrang[ed] one of the essential conditions for North-South reconciliation: the ending of meaningful political participation by the Negro" and made "clear that the Supreme Court regarded the Reconstruction era as over"); JAMES M. MCPHERSON, *ORDEAL BY FIRE* 638 (3d ed. 2001) (stating that "[t]he effect of the *Reese* and *Cruikshank* decisions, combined with the Northern loss of will to carry out reconstruction, was to inhibit further enforcement efforts"); LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 109-14, 150-54 (1966) (describing *Reese* and *Cruikshank* as damaging to black rights); TUNNELL, *supra* note 48, at 193 (describing *Cruikshank* as a "racist and morally opaque decision [that] reduced the Fourteenth Amendment and the Force Acts to meaningless verbiage as far as the civil rights of Negroes were concerned"); 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 326-27, 330 (1922) (stating that *Reese* and *Cruikshank* rendered the federal enforcement legislation "almost wholly ineffective" and characterizing the decisions as "most fortunate" for "largely eliminat[ing] from National politics the Negro question"); Cardyn, *supra* note 1, at 859 (arguing that *Reese* and *Cruikshank* "confirmed that the Court was not only determined to avoid confronting squarely the problem of klan violence, but also to downplay those aspects of the legislative history of early civil-rights law that were inconsistent with its vision of dual federalism"); Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 134 (1994) [hereinafter McConnell, *The Forgotten Constitutional Moment*] (describing *Reese* and *Cruikshank* as "major steps toward dismantling the federal power to enforce Reconstruction"); Everette Swinney, *Enforcing the Fifteenth Amendment*, 28 J. S. HIST. 202, 209 (1962) (stating that "[t]he effect of [*Reese* and *Cruikshank*] was to bring to a close the active policy of the government to enforce the Fifteenth Amendment.").

But see GOLDMAN, *supra* note 42, at 100, 106 (arguing that *Reese* and *Cruikshank* reflect "moderation in regard to the relationship between the federal government and the states," that *Reese* accepted neither the "strong nationalist position . . . [nor] extreme states' rights constitutionalism," and that *Cruikshank* "was even more narrow in its result than *Reese*"); Benedict, *supra* note 36, at 69, 72-74 (describing *Reese* and *Cruikshank* to be among decisions in "which the Supreme Court tried to sustain national authority to protect individual rights directly without permitting precedents that might later destroy the established limits between State and national power"); Maltz, *supra* note 36, at 77, 80 (arguing that *Reese*

Charles Warren wrote, rendered "the Federal statutes almost wholly ineffective to protect the Negro,"<sup>55</sup> and "entirely demolished the Radical Reconstructionist plan of protecting the rights of the negro by direct Federal legislation."<sup>56</sup> John Braeman called *Reese* "a death blow to the already faltering efforts to prosecute voting rights violations."<sup>57</sup> Eric Foner described *Cruikshank* as "[e]ven more devastating" than the *Slaughter-House Cases*, rendering "national prosecution of crimes committed against blacks virtually impossible, and g[iving] a green light to acts of terror where local officials either could not or would not enforce the law."<sup>58</sup>

*Reese* and *Cruikshank* indisputably hindered ongoing federal efforts to enforce the newly ratified Fourteenth and Fifteenth Amendments.<sup>59</sup> To be sure, neither decision precluded future federal prosecutions under a new statute or a properly crafted indictment.<sup>60</sup> But even a Court steadfastly opposed to Reconstruction might have thought political expediency counseled against wholesale invalidation of the statutes.<sup>61</sup> Both *Reese* and *Cruikshank* comport with such a stance. They dismiss federal indictments at a time when political support for federal intervention in the South was waning. They preserve opportunities for future congressional action of the sort the Court knew full well Congress would not pursue.<sup>62</sup> Absent *Reese* and

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forged a middle ground that "avoided the political consequences of upholding the prosecution, while preserving the possibility that a future Congress could intervene on behalf of African-American voters if political circumstances changed" and that *Cruikshank* "strongly reaffirmed the principle that the Fourteenth Amendment prevents states from interfering with preexisting fundamental rights").

55. 3 WARREN, *supra* note 54, at 326.

56. *Id.* at 324; *see also id.* at 326-27 (stating that all but the most radical viewed the decisions "to be wise and to open the door for more sane and liberal methods of dealing with the negro problem in the South").

57. JOHN BRAEMAN, BEFORE THE CIVIL RIGHTS REVOLUTION: THE OLD COURT AND INDIVIDUAL RIGHTS 66 (1988).

58. FONER, *supra* note 48, at 531.

59. *See* WANG, *supra* note 48, at 130 (stating *Reese* and *Cruikshank* "clearly jeopardized and discouraged enforcement"); Kennedy, *supra* note 36, at 100 (noting that "*Cruikshank* and related cases . . . made federal prosecutions of violent white supremacists considerably more difficult to sustain"); Earl Warren, *Fourteenth Amendment: Retrospect and Prospect*, in THE FOURTEENTH AMENDMENT: CENTENNIAL VOLUME 212, 218 (Bernard Schwartz ed., 1970) (noting that *Reese* and *Cruikshank* "frustrated federal efforts to bring prosecutions for interferences with the Negro's right to vote").

60. *See* Benedict, *supra* note 36, at 73.

61. *See, e.g.,* Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, *supra* note 20, at 1163 (noting that a series of congressional proposals during the late 1860s sought to impose supermajority requirements on Supreme Court adjudication and thereby limit the Court's ability to invalidate federal legislation).

62. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 402 (1985); FAIRMAN, *supra* note 42, at 278 (noting that after *Reese*, "Congress would not mend the statute in accord with the Court's instruction"); GILLETTE, *supra* note 54, at 298 (arguing that *Reese* and *Cruikshank* "served to rationalize and legiti-

*Cruikshank*, other branches of the federal government would have curbed vigorous federal enforcement actions.<sup>63</sup> Through these opinions, the Court facilitated this withdrawal by providing a semblance of legal justification as support for prevailing political sentiments.<sup>64</sup> As Professor Currie has explained, "the Court went out of its way to incapacitate the enforcement authorities after it was too late politically to expect Congress to fill the gap by enacting narrower statutes."<sup>65</sup>

*Reese*, moreover, set free defendants who the Court recognized violated the Constitution. It did so based on a strained reading of the statute that forced the Court unnecessarily to confront a constitutional question.<sup>66</sup> The first section of the 1870 Act recognized a right to be free of racial discrimination in voting, providing that citizens otherwise qualified to vote "shall be entitled and allowed to vote . . . without distinction of race, color, or previous condition of servitude."<sup>67</sup> Sections 3 and 4 described statutory offenses based on the wrongful conduct "aforesaid."<sup>68</sup> The statute, accordingly, could have been read

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mize the earlier retreat during the decisive 1870s when unfavorable public opinion, local sabotage, and federal inaction had achieved the overthrow of reconstruction"); WANG, *supra* note 48, at 131; Maltz, *supra* note 36, at 77 (stating that aggressive federal enforcement efforts were unlikely after Republican electoral defeats in 1874); McConnell, *The Forgotten Constitutional Moment*, *supra* note 54, at 134 ("[T]he practical effect [of *Reese*] was to undo a major underpinning of Reconstruction. The supposed defect in the statute could be easily remedied, but by 1876 it no longer would be. . ."); see also KACZOROWSKI, *supra* note 48, at 208 (arguing that the Grant administration wanted to abandon "the civil rights enforcement efforts that had become so politically debilitating" and thus limited its appeal in *Cruikshank* to voting issues so that "[t]he Justice Department could withdraw gracefully from an undesirable policy under the semblance of a judicial mandate").

63. See GILLETTE, *supra* note 54, at 299; KACZOROWSKI, *supra* note 48, at 208; MAGRATH, *supra* note 54, at 130 ("*Cruikshank* and *Reese* would have provoked outraged howls in the 1860's; in 1876 Congress accepted them with the mildest of taps on the Court's wrist."); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 436 (4th ed. 2001) ("At the same time that the Court was dismantling much of the Reconstruction legislation, the political coalition behind Reconstruction was also collapsing."); Maltz, *supra* note 36, at 77.

64. MAGRATH, *supra* note 54, at 133 (noting that the Court "marched in step with the national mood").

65. CURRIE, *supra* note 62, at 402.

66. While the modern articulation of the canon of avoiding constitutional questions is found in *United States ex rel. Attorney General v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909), the doctrine itself originated much earlier. See, e.g., *Murray v. The Schooner Charming Betty*, 6 U.S. (2 Cranch) 64, 118 (1804); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800).

67. In full, section 1 provided:

That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140, 140.

68. See *supra* note 41.

to establish a criminal offense, an element of which was a denial of the vote based on a "distinction of race," and not more broadly any wrongful denial of the vote.<sup>69</sup> The Court held otherwise only by disregarding the statute's legislative history,<sup>70</sup> and the interpretative canons both that penal statutes be strictly construed<sup>71</sup> and that all statutes be construed to preserve their validity.<sup>72</sup> At a minimum, the Court's view that the defendants had blocked a voter based on a "distinction of race" and thus that statutory provisions were constitutional as applied to the defendants should have counseled against invalidating the statute in its entirety.<sup>73</sup>

*Cruikshank*, too, opined on constitutional issues the Court might have avoided.<sup>74</sup> The Grant administration presented the Court with a narrow challenge to the lower-court ruling dismissing the indictments, taking issue only with the deficiency found in the charges alleging interference with the victims' voting rights.<sup>75</sup> The defendants filed a

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69. See *United States v. Reese*, 92 U.S. 214, 241-45 (1876) (Hunt, J., dissenting); see also FAIRMAN, *supra* note 42, at 278 (describing as "regrettable" that the Court did not agree with Justice Hunt, and stating that, under the statute, "[n]o person accused would be taken unawares"); MAGRATH, *supra* note 54, at 129 (describing Justice Hunt's dissent as forceful); Maltz, *supra* note 36, at 76 (describing Waite's reading as "questionable at best").

70. See *Reese*, 92 U.S. at 241 (Hunt, J., dissenting) (stating that congressional intent that the Act protected newly enfranchised black voters from racial discrimination "is too plain to be discussed"); CONG. GLOBE, 41st Cong., 2d Sess. 3663 (1870) (remarks of Sen. Sherman) (noting that the statute contains "no provision . . . but what is intended simply to prevent a discrimination on account of race, color, or previous condition of servitude" and that the use of "aforesaid" in section 4 "shows clearly enough that the intention of its framers was to confine the operation of that section to offenses against the fifteenth amendment"); FAIRMAN, *supra* note 42, at 231, 235 n.55, 250 (noting that the legislative history "would not sustain" the claim that sections 3 and 4 transcended race); Maltz, *supra* note 36, at 76-77 (stating that the debates on the 1870 Act indicate that the statute proscribed only racially motivated acts).

71. Cf. *United States v. Raines*, 362 U.S. 17, 21 (1960) (noting rule that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional").

72. See CURRIE, *supra* note 62, at 402 (stating that the Court "manipulat[ed] the statutory issues of coverage and severability"); McConnell, *The Forgotten Constitutional Moment*, *supra* note 54, at 134 (describing Reese's "reasoning" as "transparently faulty").

73. THOMAS COOLEY, *CONSTITUTIONAL LIMITATIONS* 180-81 (1868); CURRIE, *supra* note 62, at 395 n.175 (arguing that "[a]s an original matter of statutory interpretation, it would seem odd to conclude that a Congress legislating to protect voting rights would rather have no statute at all than a statute limited to offenses based on race" (citing Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 99 (1937)); McConnell, *The Forgotten Constitutional Moment*, *supra* note 54, at 134 n.64; cf. Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era: Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835, 840 n.12 (1982) (arguing that the Court's refusal to limit the statute by construction to racially motivated offenses "was certainly defensible").

74. See generally William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 832 n.4 (2001).

75. Brief for the United States at 3, *United States v. Cruikshank*, 92 U.S. 542 (1876) (No. 609) (stating that "we will confine ourselves to the 14th and 16th counts" of the indictment), reprinted in 7 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF

comprehensive brief arguing that each count of the indictment was inadequate.<sup>76</sup> In response the Waite Court issued its sweeping exegesis not just on the voting counts but also on a host of other issues, including equal protection, due process, and incorporation.<sup>77</sup>

*Cruikshank* launched the Waite Court's constriction of Congress's enforcement powers under the newly ratified Reconstruction-era Amendments.<sup>78</sup> *Cruikshank* asserts that the Equal Protection Clause governs state action alone and suggests that Congress may not regulate private action pursuant to its enforcement powers. Chief Justice Waite's opinion states that "[t]he only obligation resting upon the United States is to see that the States do not deny the right . . . . The power of the national government is limited to enforcement of this guaranty."<sup>79</sup> While arguably dictum in *Cruikshank*,<sup>80</sup> the Waite Court gave this suggestion precedential effect in *United States v. Harris*<sup>81</sup> and

THE UNITED STATES: CONSTITUTIONAL LAW 287, 290 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter 7 LANDMARK BRIEFS AND ARGUMENTS]; see also FAIRMAN, *supra* note 42, at 274 (noting that *Cruikshank* "was not confined to the counts on which the Government had rested" and characterizing the result as "wise, in order that the opinion might be more instructive"); ROBERT J. HARRIS, THE QUEST FOR EQUALITY 84 (1960) (stating that *Cruikshank* "went far beyond the necessities of the case to give a very narrow construction of the due process and equal protection clauses").

76. Brief for Defendants, *United States v. Cruikshank*, 92 U.S. 542 (1876) (No. 609), reprinted in 7 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 75, at 347.

77. See *supra* text accompanying notes 50-53.

78. The Supreme Court's narrow reading of the Reconstruction-era Amendments and the congressional legislation enforcing them predates the Waite Court. See, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1873) (denying that the Fourteenth Amendment "radically changes the whole theory of the relations of the State and Federal governments to each other"); *Bylew v. United States*, 80 U.S. (13 Wall.) 581 (1872) (holding that a black murder victim was not "affect[ed]" by the prosecution of white defendants charged with the killing, and hence that the case was not entitled to removal to federal court under § 3 of the Civil Rights Act).

79. *Cruikshank*, 92 U.S. at 555.

80. Sections 3 and 4 of the 1870 Act prohibited interference only with rights "granted or secured" by the Constitution and as such arguably did not proscribe private conduct, at least in connection with claimed denials of equal protection and due process. See CURRIE, *supra* note 62, at 396 & n.184 (arguing that "Congress had forbidden only violations of the Constitution" and that the statutory formulation was "properly broad enough to allow Congress to see to it that private persons do not induce or assist the state in denying fourteenth amendment rights" but did not extend to purely private action); Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1377-78 (1964) (asserting that *Cruikshank* "does not say, nor does it clearly imply that Congress has no power to impose new duties on private individuals"); Maltz, *supra* note 36, at 79 (stating that the *Cruikshank* Court "had been careful to leave open the question of whether Congress possessed broad authority to regulate private racially motivated activity"); cf. McConnell, *The Forgotten Constitutional Moment*, *supra* note 54, at 135 (arguing that *Cruikshank* rests on the proposition that private persons cannot violate the Fourteenth Amendment and "[t]hus, the federal government had no power to protect against the private violence that was the principal means by which white Democrats sought to nullify the protections of the law").

81. 106 U.S. 629 (1883).

the *Civil Rights Cases*.<sup>82</sup> These latter decisions do not categorically bar Congress from reaching private action in this realm,<sup>83</sup> but, in notable contravention of the Framers' intent,<sup>84</sup> significantly narrow the contexts in which such action may be pursued.

These characteristics notwithstanding, *Reese* and *Cruikshank* are more narrow, and indeed less damaging to the First Reconstruction, than the prevailing critique suggests.<sup>85</sup> With regard to blocking racial

82. 109 U.S. 3 (1883).

83. See *Harris*, 106 U.S. at 639 (stating that the Fourteenth Amendment "imposes no duty and confers no power upon Congress" to act where state laws, as enacted, construed and enforced, "recognize and protect the rights of all persons"); *The Civil Rights Cases*, 109 U.S. at 14 (stating that the contested law was not "corrective of any constitutional wrong committed by the States" and was not based on "any supposed or apprehended violation of the Fourteenth Amendment on the part of the States"); 3 WARREN, *supra* note 54, at 339 (stating that under Section 5, "Congress may, within bounds, provide the modes of redress against individuals when a State has violated the prohibitions [of Section 1 of the Fourteenth Amendment]"); Benedict, *supra* note 36, at 66-67 (arguing that *Cruikshank* and the *Civil Rights Cases* "never rejected absolutely and without caveat" congressional power to protect rights violated by state inaction); Frantz, *supra* note 80, at 1377-81 (arguing that *Cruikshank*, *Harris*, and the *Civil Rights Cases* do not adopt "the extreme view that congressional enforcement power never extends to 'private acts'"); Post & Siegel, *supra* note 5, at 476. But cf. Maltz, *supra* note 36, at 79 (arguing that *Cruikshank* and *Harris* "had been careful to leave open the question of whether Congress possess [sic] broad authority to regulate private, racially motivated activity" and that the *Civil Rights Cases* "largely foreclosed this possibility").

Language in *United States v. Morrison*, 529 U.S. 598 (2000), suggests that the Court there read *Harris* and the *Civil Rights Cases* as establishing this categorical rule, see *Morrison*, 529 U.S. at 620-21, and that *Morrison* purported to apply it. *Id.* at 626 (noting that VAWA "is not directed at any State or state actor, but at individuals"); see Evan H. Caminker, *Private Remedies for Public Wrongs Under Section 5*, 33 LOY. L.A. L. REV. 1351, 1353 (2000) [hereinafter Caminker, *Remedies for Public Wrongs Under Section 5*] (arguing that *Morrison* affirms private remediation "is a *per se* inappropriate means of Section 5 enforcement"). Even so, the Court's observation that Congress's findings did not support nationwide application of the statute, see *Morrison*, 529 U.S. at 626-27, undercuts its suggestion that Congress may never reach private action pursuant to its Section 5 powers. See Caminker, *supra*, at 1359-72 (arguing that *Morrison* errs and that private remediation for unconstitutional state action can comport with the constitutional text, Supreme Court precedent, and principles of federalism); Post & Siegel, *supra* note 5, at 443, 445 (finding unclear "whether and to what extent" Section 5 legislation may regulate private conduct and rejecting contention that *Morrison* establishes a *per se* ban on such regulation).

84. See CURRIE, *supra* note 62, at 397 (noting that "[a] strong argument can be made, on the basis of the origins of the equal protection clause, that private lynching was among the evils that Congress was meant to have power to forbid"); John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 162-63 (1950) (arguing that the view the Fourteenth Amendment "ha[s] no bearing upon discriminatory acts by private persons . . . was so totally foreign to the conceptions of those who passed the Amendment that no real assessment of it can be made in terms of reconstruction attitudes"); Frantz, *supra* note 80, at 1357 ("Congress believed it possessed . . . power to protect the newly-freed Negro from private aggression . . ."); Gressman, *supra* note 36, at 1340 (arguing that "[i]t was private action, not state action, that had caused so much of the post-war bloodshed and atrocities in the South").

85. See GOLDMAN, *supra* note 42, at 100, 109; Benedict, *supra* note 36, at 71-75 (discussing ways in which both decisions authorize broad federal power to protect individual rights); Kennedy, *supra* note 36, at 100 (arguing that Waite Court critics "oversimplify" by exaggerating the extent to which the Waite Court hobbled federal efforts to protect blacks and neglecting the extent to which certain Waite Court rulings extended protection to blacks



discrimination in voting in particular, both *Reese* and *Cruikshank* suggest that the Waite Court thought Congress enjoys considerably more power than it possesses in other realms.<sup>86</sup> To be sure, *Reese* holds that the Fifteenth Amendment prohibits race-based discrimination in voting and permits Congress to proscribe only similarly motivated acts. This suggests that “appropriate” federal legislation in this realm must require proof of racially discriminatory intent.<sup>87</sup> When viewed through the lens of contemporary doctrine, the implication is that Congress may not proscribe facially race-neutral conduct for which racial animus is the likely motivation.<sup>88</sup> More generally, *Reese* implies that Congress may not proscribe constitutional conduct even where it deems such proscriptions necessary to remedy a constitutional violation.<sup>89</sup>

The Waite Court was not, however, committed to this proposition, as *Cruikshank* and *Reese* themselves indicate. *Reese* strikes down the statutory provisions because the Court understood them to proscribe wrongful conduct that denied the vote for reasons wholly unrelated to race and accordingly unrelated to conduct violating the Fifteenth Amendment.<sup>90</sup> The United States’ brief in the Supreme Court stated

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in circumstances that would have plausibly allowed for a different outcome”); Maltz, *supra* note 36, at 81 (arguing that the Waite Court’s voting and jury cases “reflect sympathy for major elements of the Republican theory of federal power”); *see also* CURRIE, *supra* note 62, at 402 (rejecting as too extreme the critique that the Waite Court undermined Congress’s enforcement powers and “abandon[ed] blacks to the mercies of Southern hostility”); KACZOROWSKI, *supra* note 48, at 213 (arguing that *Reese* “implicitly reject[s] the defense’s narrow interpretation of state action”).

86. *See* GOLDMAN, *supra* note 42, at 106 (noting that “[b]oth decisions agreed that the Fifteenth Amendment did protect citizens from voter discrimination based on race . . . [and both] clearly and explicitly confirmed congressional authority to protect that right from discrimination based on race”); WANG, *supra* note 48, at 132 (arguing that *Reese* and *Cruikshank* preserved the federal government’s “power to enforce the Fifteenth Amendment” and both agreed that “Congress had the power to protect . . . the right to be exempt from voting discrimination on account of race”).

87. *Cf.* McConnell, *The Forgotten Constitutional Moment*, *supra* note 54, at 134 (suggesting that insofar as the statutory provisions in *Reese* applied “to denials of the right to vote on grounds other than race,” they “exceeded” Congress’s powers under Section 2 of the Fifteenth Amendment).

88. Nearly a century later, the Court would reject this suggestion by upholding congressional power to proscribe seemingly race-neutral electoral practices for which Congress suspects racially discriminatory intent is the motivation. *See Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *see also* CURRIE, *supra* note 62, at 393-94 (noting that while *Reese*’s conclusion that the congressional enforcement power extends only to racially motivated electoral practices “seems obvious from the language and evident purpose of the enforcement provision,” the principle requires “some qualification to prevent evasion”).

89. *See* Caminker, *Remedies for Public Wrongs Under Section 5*, *supra* note 83, at 1362 (distinguishing permissible means from permissible ends of Section 5 legislation).

90. *See* *United States v. Reese*, 92 U.S. 214, 218-20 (1876); *see also* FAIRMAN, *supra* note 42, at 249 (suggesting that the Court held the statute to be “inappropriate” legislation because it understood it to target conduct regarding which “there was no design to thwart the enforcement of the Fifteenth Amendment”); Warren, *supra* note 59, at 219 (stating that

that the statute transcended race-based denials of the vote, notwithstanding evidence that Congress meant for the proscription to block only racially motivated conduct.<sup>91</sup> The Solicitor General wrote that the statutory provisions prohibited “unlawful hindrances . . . upon any account and by any person,” and accordingly “have a much wider application than is needed for the case before us.”<sup>92</sup> The Court accepted this construction and thus did not address whether Congress had power to proscribe race-neutral conduct in order to block race-based discrimination in voting.

*Reese* and *Cruikshank* moreover decline to resolve whether Congress may more easily proscribe private, and thus constitutional, conduct pursuant to its enforcement powers under the Fifteenth Amendment than it may under the Fourteenth. *Reese* invalidates sections 3 and 4 of the 1870 Act for failing to require racial motivation, stating that “Congress can interfere” in state elections only when a State “wrongful[ly] refus[es] to receive the vote of a qualified elector . . . because of race, color, or previous condition of servitude.”<sup>93</sup> So too, *Cruikshank* dismisses indictment counts pertaining to voting because the indictment counts alleging interference with the victims’ voting rights did not assert a racial motivation.<sup>94</sup> In so doing, neither decision suggests any constitutional infirmity stemming from the application of the relevant statutes to purely private conduct in connection with voting.<sup>95</sup>

To be sure, this omission may reflect nothing more than that the Court had already dispensed with the voting claims on intent grounds

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*Reese* “did not take from Congress the power to legislate against racially motivated interferences with the right to vote”).

91. See *supra* note 69 and accompanying text.

92. See Brief for the United States at 29, *United States v. Reese*, 92 U.S. 214 (1876) (No. 145); see also FAIRMAN, *supra* note 42, at 237 (arguing that the government’s brief in *Reese* “was working in effect against the possibility that the Court might read [the statute] more narrowly and, so construed, sustain it”); GOLDMAN, *supra* note 42, at 79.

93. *Reese*, 92 U.S. at 218.

94. See *United States v. Cruikshank*, 92 U.S. 542, 556 (1875) (noting that “[w]e may suspect that race was the cause of the hostility; but it is not so averred”).

95. See BRAEMAN, *supra* note 57, at 65, 68; Benedict, *supra* note 36, at 72; Maltz, *supra* note 36, at 79. But see HYMAN & WIECEK, *supra* note 36, at 489 (reading *Reese* and *Cruikshank* as placing the Court “well on a state-action-only path of interpretation”); MCPHERSON, *supra* note 54, at 638 (reading *Reese* and *Cruikshank* as “narrow[ing] the scope of the Fourteenth and Fifteenth Amendments” and establishing that the Amendments “empowered Congress to legislate only against discrimination by states”); TUNNELL, *supra* note 48, at 193 (reading *Cruikshank* to hold that “because a private army and not the State of Louisiana committed the massacre, the federal government was powerless to act”); SCHMIDT, *supra* note 73, at 840 n.14 (arguing that *Cruikshank* rested on state action under the Fourteenth Amendment and had clear implications for federal power to protect black voters from private violence under the Fifteenth, given that it too was directed at the States).

and thus was not required to address state action as well.<sup>96</sup> It certainly falls short of affirmatively establishing federal power to proscribe private conduct.<sup>97</sup> Still, the Court's refusal to pass on the question of private action suggests a receptivity to congressional power in this realm incompatible with steadfast opposition to Reconstruction. The Fourteenth and Fifteenth Amendments both proscribe state action.<sup>98</sup> But in his circuit court decision in *Cruikshank*,<sup>99</sup> Justice Bradley expressly distinguished the two Amendments on state action grounds.<sup>100</sup> The lower court in *Reese* split on whether Congress could punish private individuals who interfered with voting rights secured by the Fifteenth Amendment.<sup>101</sup> Counsel for the defendants in both *Reese* and *Cruikshank* challenged congressional power to reach private action under the Fifteenth Amendment.<sup>102</sup> And yet, in both cases, the Court opted to resolve the voting claims on intent grounds, even

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96. See, e.g., CURRIE, *supra* note 62, at 395-96 n.182 (rejecting reading *Reese* and *Cruikshank* to embrace congressional power to reach private conduct under the Fifteenth Amendment because it "seems to confuse deciding with refusing to decide"); Sarah B. Lawsky, Note, *A Nineteenth Amendment Defense of the Violence Against Women Act*, 109 YALE L.J. 783, 805-06 n.142 (2000) (stating that "[t]o conclude that there is no state action requirement for the Fifteenth Amendment because the Court chose different grounds on which to invalidate the statutes in question seems an unwarranted leap — an extraordinarily strong version of *expressio unius est exclusio alterius*").

97. See JOHN MABRY MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 103 (1909) (noting that *Cruikshank* "neither affirmed nor denied Bradley's opinion that the Amendment inhibits the acts of private individuals"). But see BRAEMAN, *supra* note 57, at 68 (stating that "[d]icta in *Cruikshank* and *Reese* had upheld the power of Congress to reach racially motivated violations of voting rights — whether privately or official done — in state and local elections"); Benedict, *supra* note 36, at 72 (arguing that *Reese* and *Cruikshank* "endorsed Bradley's expansive view of congressional authority to enforce the Fifteenth Amendment against individual infringements of the rights to vote . . . [and] agree[d] that Congress could punish private offenses against citizens' voting rights so long as they were motivated by race or previous condition of servitude"); see also Maltz, *supra* note 36, at 85 (finding support in *Ex parte Yarbrough*, 110 U.S. 651 (1884), for this same proposition). For evidence that at least some of the Justices understood Congress to possess this power, see *United States v. Butler*, 25 F. Cas. 213 (C.C.D. S.C. 1877) (No. 14,700) (opinion of Waite, C.J.); *United States v. Cruikshank*, 25 F. Cas. 707, 712-13 (C.C.D. La. 1874) (No. 14,897) (opinion of Bradley, J.).

98. Compare U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."), with U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

99. *Cruikshank*, 25 F. Cas. 707 (C.C.D. La. 1874).

100. *Id.* at 712-13 (stating that, in contrast to the Fourteenth Amendment, the Fifteenth Amendment created "a positive right" and conferred on Congress "the power to secure that right not only as against the unfriendly operation of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of the state laws").

For a discussion of Justice Bradley's opinion, see GOLDMAN, *supra* note 42, at 55-57; KACZOROWSKI, *supra* note 48, at 182-83; WANG, *supra* note 48, at 126-27; Benedict, *supra* note 36, at 71-74; Michael G. Collins, *Justice Bradley's Civil Rights Odyssey Revisited*, 70 TUL. L. REV. 1979, 1992-95 (1996).

101. See KACZOROWSKI, *supra* note 48, at 202.

102. See *id.*

though *Cruikshank* relied on state action to dismiss the Fourteenth Amendment counts.<sup>103</sup> Both cases squarely presented the Court with the question whether Congress can reach private action under the Fifteenth Amendment and in both cases the Court declined to resolve it.<sup>104</sup>

*Reese's* analysis of section 3 of the Enforcement Act of 1870 also suggests that the Waite Court thought that Congress enjoys notably broad power to remedy Fifteenth Amendment violations. Section 3 provided that a citizen's offer to perform a state-mandated prerequisite to voting shall "be deemed and held as a performance in law of such act" insofar as the offer "fail[s] to be carried into execution by reason of the wrongful act or omission aforesaid" of the person charged with giving it effect.<sup>105</sup> As *Reese* explains, the provision effected a dramatic change in state electoral practice. Not only had Congress prescribed electoral rules "not provided by the laws of the States," but the Act "substitutes, under certain circumstances, performance wrongfully prevented for performance itself."<sup>106</sup> In the circumstances described, state-voting inspectors were required to treat the citizen's submission of attempted compliance "as the equivalent of the specified requirement."<sup>107</sup> In other words, Congress had assumed for itself the institutional role of state-election inspector, implementing by force of law the rules of decision it had prescribed for state elections and binding other state actors to honor the results.

*Reese*, of course, strikes down this statutory provision as unconstitutional. But it does so because the Court perceived a lack of clarity as to what the provision proscribed and not because the remedy prescribed was deemed to intrude too greatly into state sovereignty. Reading the statute to apply to wrongful refusals not motivated by race, or at a minimum to be vague on this point,<sup>108</sup> *Reese* states that a change in practice as "radical" as the one section 3 attempted "should be explicit in its terms . . . . The law ought not be in such a condition that the elector may act upon one idea of its meaning, and the inspec-

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103. *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1876).

104. The Court affirmatively held that Congress lacked the power to reach private action under the Fifteenth Amendment in *James v. Bowman*, 190 U.S. 127 (1903). Cf. Voting Rights Act § 11(b), 42 U.S.C. § 1973(i)(b) (2000) (barring any person "whether acting under color of law or otherwise" from intimidating actual or prospective voters); *Nipper v. Smith*, 39 F.3d 1494, 1549 n.2 (11th Cir. 1994) (en banc) (Hatchett, J., dissenting) (stating that the constitutionality of § 11(b) is "questionable"); *United States v. Harvey*, 250 F. Supp. 219 (D.C. La. 1966) (invalidating application of § 11(b) to landlords who evicted black tenants who had registered to vote).

105. Act of May 31, 1870, ch. 114, §§ 3, 4, 16 Stat. 140-41, *repealed by* 28 Stat. 36, 37 (1894).

106. *United States v. Reese*, 92 U.S. 214, 219 (1876).

107. *Id.*

108. *Id.* at 219-20.

tor upon another.”<sup>109</sup> *Reese* thus asserts that the statute provided inspectors and voters alike insufficient guidance regarding the scope of its proscription. Had the statute more explicitly limited the triggering state action to racially motivated conduct, *Reese* implies that Congress could constitutionally have assumed the institutional role set forth in section 3, that is, Congress could “substitute[] . . . performance wrongfully prevented for performance itself.”<sup>110</sup>

*Reese* does not hold that Congress may assume this role any more than *Reese* and *Cruikshank* establish definitively that Congress can broadly reach private action when acting to enforce the Fifteenth Amendment’s proscription on race-based discrimination in voting. Instead, both decisions set forth narrow legal holdings that carefully leave open the possibility that Congress possesses such broad and intrusive power. The Court’s willingness to leave this possibility open is noteworthy, particularly given the lack of restraint displayed elsewhere in the same opinions. The Court’s refusal to foreclose these opportunities for congressional action temper the charge that *Reese* and *Cruikshank* evince the Court’s determination to end Reconstruction and “protect[] white supremacy.”<sup>111</sup>

## II. THE REHNQUIST COURT AND CONGRESS’S ENFORCEMENT POWERS

Like those of the Waite Court, decisions of the Rehnquist Court circumscribe Congress’s authority to frame antidiscrimination measures pursuant to the Reconstruction-era Amendments. They nevertheless accord Congress significant deference when it acts to address racial discrimination in voting. This Part identifies this deference in *City of Boerne v. Flores*<sup>112</sup> and its progeny.<sup>113</sup> The *Boerne* decisions significantly limit Congress’s enforcement powers,<sup>114</sup> but nevertheless preserve seemingly contrary precedent upholding provisions of the Voting Rights Act (“VRA”) against constitutional challenge. This Part then argues that this deference may be reconciled with the seem-

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109. *Id.* at 219; cf. KACZOROWSKI, *supra* note 48.

110. *Reese*, 92 U.S. at 219. *But see* Schmidt, *supra* note 73, at 840 n.12 (arguing that this language from *Reese* “reveal[s] a general hostility to federal intervention in state elections.”).

111. KOUSSER, *supra* note 1, at 49-50; *see also supra* note 54.

112. 521 U.S. 507 (1997).

113. *See* Nevada Dep’t of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); United States v. Morrison, 529 U.S. 598 (2000); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

114. *Hibbs* is the exception. *See supra* note 12.

ing antipathy several recent voting-rights decisions display toward the VRA and Congress.

#### A. *The Boerne Decisions and the VRA Precedent*

*City of Boerne v. Flores* announced the now familiar requirement that congressional legislation enforcing the Reconstruction Amendments must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>115</sup> In four years, six federal statutes fell under this standard, notwithstanding the nominally "wide latitude"<sup>116</sup> the Court maintains Congress enjoys in framing enforcement legislation.<sup>117</sup> Applying rigorous review, the Court has deemed linkages between statutory proscriptions and constitutional injuries too attenuated, statutory remedies too broad, and underlying congressional findings too skimpy to render various statutory provisions valid exercises of Congress's enforcement power.

Elements of the *Boerne* decisions offer support for the view that the Rehnquist Court is hostile to the Second Reconstruction and that it engages in "conservative activism" to dismantle it.<sup>118</sup> Nearly all of

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115. *Boerne*, 521 U.S. at 520.

116. *Id.*

117. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (invalidating abrogation of state immunity in Title I of the Americans with Disabilities Act); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating § 13981 of VAWA); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (invalidating attempted abrogation of state immunity in the ADEA); *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (invalidating attempted abrogation of state immunity in the Trademark Remedy Clarification Act); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (invalidating abrogation of state immunity in the Patent and Plant Variety Protection Remedy Clarification Act); *Boerne*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act ("RFRA") as applied to state and local action).

118. See, e.g., *Kimel*, 528 U.S. at 98-99 (Stevens, J., dissenting in part and concurring in part) (stating that "[t]he kind of judicial activism manifested" in various federalism cases including the *Florida Prepaid* and *College Savings Bank* decisions "represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises"); Balkin & Levinson, *supra* note 1, at 1054; Judith Olans Brown & Peter D. Enrich, *Nostalgic Federalism*, 28 HASTINGS CONST. L.Q. 1, 1-2, 40 (2000) (describing federalism decisions as "signal[ing] a newly activist role for the courts in patrolling the boundaries of federal authority" and the *Boerne* doctrine, as applied in *Kimel*, as embodying a "radical restriction on congressional power to determine its own agenda in matters pertaining to individual rights"); Chemerinsky, *The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights*, *supra* note 4, at 602 (describing *Boerne* as displaying "conservative judicial activism"); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 87 (2001) (arguing that decisions like *Kimel* and *Morrison* embody "judicial activism in which disrespect for Congress is a fundamental element"); Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 39-40 (2000) (drawing parallels between *Boerne* and *Lochner v. New York*, 198 U.S. 45 (1905)); Cass Sunstein, *A Hand in the Matter*, LEGAL AFF., Mar./Apr. 2003, at 27-28 (suggesting that in striking down portions of the ADA, ADEA, and VAWA, "[t]he Rehnquist Court has been engaged in right-wing judicial activism"). But see Marci A. Hamilton, *Nine Shibboleths of the New Federalism*, 47 WAYNE L. REV. 931, 932 (2001) (arguing that *Boerne* "is far from being wildly activist").

these decisions diminish the scope of federal regulation by invalidating federal statutes and circumscribing congressional power to enforce the Fourteenth Amendment. *Boerne* eliminated the Religious Freedom Restoration Act's ("RFRA") broad application to virtually all types of state and local governmental decisions.<sup>119</sup> *Florida Prepaid*, *College Savings Bank*, *Kimel*, and *Garrett* shield states from potential financial liability and the dignitary affront said to accompany the abrogation of state immunity that Congress had attempted.<sup>120</sup> *Morrison* ensured exclusivity of state power in a realm in which VAWA sought to provide a supplemental federal remedy.<sup>121</sup> *Boerne*, *Kimel*, *Morrison*, and *Garrett* all strike down statutes that may aptly be deemed antidiscrimination or civil-rights measures of the type thought to constitute the core of the Second Reconstruction.<sup>122</sup> And while *Hibbs* seems to break this trend by upholding the Family Medical Leave Act, it does so without casting doubt on the doctrinal validity of the preceding *Boerne* cases.<sup>123</sup>

As a group, the *Boerne* cases announce new principles defining congressional power that appear inconsistent with precedent and historical understandings of the scope of that power.<sup>124</sup> *Boerne* holds that Congress lacks authority to engage in independent constitutional interpretation and that its Section 5 power is limited to remedying

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119. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79, 105-06 (describing RFRA's breadth of application); Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional*, 1 U. PA. J. CONST. L. 1, 9-10 (1998) (same).

120. Cf. Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 52-56 [hereinafter Young, *State Sovereign Immunity and the Future of Federalism*] (criticizing the view that state dignitary interests justify sovereign immunity, and stating that "[i]t is simply an extraordinary statement, in our political tradition, to suggest that any governmental entity has a 'dignity' intrinsically superior to that of the individual. There are no kings here.").

121. See, e.g., Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 136, 149 (2000) (stating that VAWA "duplicated no state law in theory, design, or remedy," that it was a law "with federalism-friendly concurrent jurisdiction," and that it "provided merely a supplementary civil option while leaving state criminal remedies in place").

122. *Id.* at 135; Post & Siegel, *supra* note 5, at 486-502, 513-22.

123. See *Nevada Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1977-78, 1981-83 (2003); *supra* note 12; *infra* note 135.

124. See, e.g., Vikram David Amar & Samuel Estreicher, *Conduct Unbecoming of a Co-ordinate Branch: The Supreme Court in Garrett*, 4 GREEN BAG (2d ser.) 351, 354-55 (2001) (describing the "new-fangled congruence and proportionality test" set forth in the *Boerne* decisions and accusing the Court of "making up new rules that Congress could not reasonably have anticipated"); Reva B. Siegel, *Text in Context: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 349 (2001) (noting that "*Boerne* and its progeny break with the doctrinal frameworks — and institutional understandings — through which the Court has defined Congress's power to enact civil rights legislation since the beginning of the second Reconstruction").

violations of constitutional rights as defined by the Court.<sup>125</sup> This holding expressly rejects *Katzenbach v. Morgan*'s suggestion that Congress may "ratchet up" constitutional protections as construed by the Court,<sup>126</sup> and historical evidence indicating that the Framers of the Fourteenth and Fifteenth Amendments intended for Congress to have this authority.<sup>127</sup>

As the measure of the "appropriateness" of remedial legislation, moreover, the congruence-and-proportionality test represents a new and substantial hurdle that renders congressional action in this realm inherently suspect, much in the way that use of a racial classification triggers strict scrutiny.<sup>128</sup> The Court has examined the disputed statutes

125. *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997) ("Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.").

126. *Id.* at 527-28 (noting language in *Morgan* that "could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment" but stating that "[t]his is not a necessary interpretation, however, or even the best one"); see also *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966); Shane, *supra* note 4, at 207 n.37 (arguing that *Morgan* was no longer good precedent when *Boerne* was decided); Young, *State Sovereign Immunity and the Future of Federalism*, *supra* note 120, at 13-14.

127. See, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822-23 & n.292 (1999) (arguing that the Framers intended for Congress to exercise broad enforcement powers under the Thirteenth and Fourteenth Amendments and that this power was not limited to remedial legislation); Akhil Reed Amar, *The Supreme Court, 1999 Term — Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 118 (2000) (arguing that the "Reconstruction Republicans aimed to give Congress broad power to declare and define the fundamental rights — the privileges and immunities — of American citizens above and beyond the floor set by courts"); Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, *supra* note 20, at 1132 (characterizing some participation by Congress in the definition of constitutional norms"); Laycock, *supra* note 118, at 39 & n.55; Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 195 (1997) [hereinafter McConnell, *Institutions and Interpretation*] (suggesting that *Boerne* conflicts with the Framers' intent); see also Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115, 133 (1999) (arguing that *Boerne*'s historical analysis "does not hold up under scrutiny" and that the Fourteenth Amendment's legislative history "do[es] not provide any support for a narrowing of Congress's power to enforce" the Amendment). But see Hamilton, *supra* note 118, at 934-35 (arguing that "[t]he constitutional structure feature that is enforced in the federalism cases is not inherently at odds with the Fourteenth Amendment").

128. See, e.g., 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-16, at 959 (3d ed. 2000); Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, *supra* note 20, at 1147 (arguing that *Boerne*'s congruence-and-proportionality test "clearly deviated from the Court's longstanding articulation and application of the more deferential *McCulloch* means-ends standard"); Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 91 (noting that "congruence and proportionality is a demanding standard"); Stephen Gardbaum, *The Federalism Implications of Flores*, 39 WM. & MARY L. REV. 665, 682 (1998) (stating that *Boerne* establishes a "more rigorous" test for determining whether legislation is appropriate under Section 5); McConnell, *Institutions and Interpretation*, *supra* note 127, at 166 (noting congruence and proportionality elevates level of scrutiny applied to Section 5 legislation); Post & Siegel, *supra* note 5, at 477



with considerable rigor and has demanded extensive findings of underlying unconstitutional conduct to validate congressional enforcement legislation.<sup>129</sup>

The *Boerne* decisions establish that Congress cannot rely on either general assertions or isolated examples of unconstitutional conduct,<sup>130</sup> but instead must document a widespread pattern of such conduct by entities of the precise sort being subject to suit.<sup>131</sup> *Boerne*, *Florida Prepaid*, *College Savings Bank*, *Kimel*, *Morrison*, and *Garrett* each reject as inadequate the findings underlying the disputed statutes on the grounds that Congress documented too few instances of unconstitutional conduct.<sup>132</sup> Even the sizable record Congress amassed regarding the inadequacy of state attempts to combat gender-motivated violence proved insufficient to save VAWA because

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(equating congruence and proportionality with narrow tailoring required by strict-scrutiny analysis).

129. See *infra* notes 130-135.

130. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370 (2001) (dismissing “unexamined, anecdotal accounts of ‘adverse, disparate treatment by state officials,’ ” when found outside the formal legislative findings); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 90 (2000) (rejecting as insufficient “assorted sentences . . . cobble[d] together from a decade’s worth of congressional reports and floor debates” as either general unsubstantiated assertions or isolated anecdotal examples). While the Court has not wholly rejected anecdotal evidence suggesting unconstitutional conduct, it has treated such examples with considerable skepticism and indicated its preference for examples of adjudicated constitutional violations. See, e.g., *Garrett*, 531 U.S. at 375-76 (Kennedy, J., concurring) (noting absence of “confirming judicial documentation” in the form of court decisions addressing unconstitutional discrimination by States against people with disabilities).

131. See, e.g., *Kimel*, 528 U.S. at 91 (finding that Congress failed “to uncover any significant pattern of unconstitutional discrimination,” and that it lacked “evidence of widespread and unconstitutional age discrimination by the States”); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999) (concluding that “Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations”); *City of Boerne v. Flores*, 521 U.S. 507, 531 (1997) (noting absence of evidence documenting “some widespread pattern of religious discrimination in this country”); *id.* at 526 (noting absence of a “widespread and persisting deprivation of constitutional rights”).

132. See, e.g., *Garrett*, 531 U.S. at 370 (finding that the lengthy legislative record documenting employment discrimination against the disabled included few instances of invidious state activities and noting that even if six specific record examples involving contemporary state action amounted to unconstitutional discrimination, they “fall far short of even suggesting the pattern of unconstitutional discrimination on which §5 legislation must be based”); *Morrison*, 529 U.S. at 626 (holding record inadequate for failing to identify violations in every State); *Kimel*, 528 U.S. at 89 (finding legislative findings underlying the abrogation of state immunity in the ADEA so wanting as to render Congress’ extension of the Act to the States “an unwarranted response to a perhaps inconsequential problem”); *Coll. Sav. Bank*, 527 U.S. at 645-46 (“Congress appears to have enacted this legislation in response to a handful of instances of state patent infringement that do not necessarily violate the Constitution.”); *City of Boerne*, 521 U.S. at 530-31 (noting that documented instances of state-sponsored religious bigotry dated back forty years or more, while more recent examples involved benignly motivated laws of general applicability that placed only “incidental burdens” on religion and reflected neither “animus [n]or hostility to burdened religious practices”).

Congress had not compiled findings of unconstitutional conduct in every State.<sup>133</sup> *Garrett* subsequently cited neither a state-by-state requirement nor *Morrison* at all, but likewise dismissed a lengthy record of legislative findings for failure to identify unconstitutional conduct expressly by States.<sup>134</sup> And while *Hibbs* again seems to depart from this trend by deeming the congressional record underlying the FMLA adequate, the decision is careful to emphasize “the extent and specificity” of unconstitutional state conduct found in that record and to affirm the continuing validity of *Boerne*’s demanding “means-ends” approach.<sup>135</sup>

This rigorous approach contrasts significantly with that taken by the Court in a quartet<sup>136</sup> of earlier decisions upholding provisions of the VRA challenged as enactments exceeding Congress’s enforcement power. *South Carolina v. Katzenbach*<sup>137</sup> upholds congressional power to suspend literacy tests and other voting qualifications in jurisdictions that historically engaged in voting discrimination. It also affirms Congress’s power to block such jurisdictions from changing their electoral practices

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133. *Morrison*, 529 U.S. at 626 (stating “that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States”); Post & Siegel, *supra* note 5, at 478.

134. *Garrett*, 531 U.S. at 368-69; see also *Kimel*, 528 U.S. at 90 (finding that even if a state report established unconstitutional age discrimination by that State, it was not sufficient to establish that unconstitutional age discrimination “‘had become a problem of national import.’” (quoting *Florida Prepaid*, 527 U.S. at 641)).

*Garrett* moreover suggests that supportive evidence found in documents outside the formal legislative record should be disregarded. The opinion disregards “a host of incidents” that purported to represent unconstitutional state discrimination in employment based on disability because those incidents consisted “not of legislative findings, but of unexamined, anecdotal accounts” that did not necessarily rise to constitutional dimension and that were submitted “not directly” to Congress but instead to a task force that did not specifically address state discrimination in employment. See *Garrett*, 531 U.S. at 370-71.

135. *Hibbs*, 123 S. Ct. at 1981-82 & n.11. To be sure, *Hibbs* acknowledges that the record underlying the FMLA was not markedly more comprehensive than the records *Garrett* and *Kimel* deemed inadequate. *Id.* at 1981. *Hibbs* nevertheless insists that Congress may more easily demonstrate a pattern of state constitutional violations when it targets gender-based distinctions than when it addresses nonsuspect classifications. The reason, *Hibbs* states, is that the heightened judicial scrutiny triggered by gender discrimination makes defending gender-based distinctions more difficult. *Id.* at 1982; *supra* note 12. *Hibbs* leaves unanswered, however, why this heightened scrutiny did not establish the sufficiency of the far more extensive record underlying VAWA in *United States v. Morrison*. See 529 U.S. 598 (2000) (rejecting congressional power to subject private parties to liability under VAWA); see also Coyle, *supra* note 12 (noting tensions between *Hibbs* and *Morrison*). And to the extent that the Court does accord Congress greater deference in the realm of gender discrimination, *Hibbs* makes clear that it will continue to require specific and extensive supporting congressional findings. Thus while *Hibbs* is certainly more deferential to legislative judgments than was *Kimel* or *Garrett*, the decision hardly accords Congress the tremendous leeway displayed in the earlier VRA cases. See *infra* notes 149-153 and accompanying text.

136. See Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 727 (1998) [hereinafter Karlan, *Two Section Twos and Two Section Fives*] (describing voting-rights precedent cited in *Boerne* as the “Voting Rights quartet”).

137. 383 U.S. 301 (1966).

absent prior federal preclearance certifying that the proposed changes were discriminatory neither in purpose nor in effect.<sup>138</sup> *Katzenbach v. Morgan* affirms Congress's authority to bar English literacy as a prerequisite to voting for graduates of designated non-English-language schools.<sup>139</sup> *Oregon v. Mitchell*<sup>140</sup> upholds congressional power to suspend the use of the literacy tests nationwide for a five-year period. *City of Rome v. United States*<sup>141</sup> affirms the constitutionality of the VRA's preclearance process, as extended in 1975, and expressly approves congressional power to ban within that process practices that are discriminatory in effect, even if evidence of underlying discriminatory intent is absent.<sup>142</sup> Read together, these decisions embrace expansive federal authority to intrude deeply into state sovereign processes, to prohibit conduct the Constitution permits,<sup>143</sup> and to promote the race-conscious policies that inhere in the VRA.<sup>144</sup> They support the creation and maintenance of the large federal bureaucracy needed to implement the VRA's provisions.<sup>145</sup>

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138. For a description of the preclearance process under § 5 of the VRA, see *infra* notes 169-171 and accompanying text.

139. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *infra* notes 147-153 and accompanying text (discussing *Katzenbach v. Morgan*). Congress intended for the provision to override New York's English literacy requirements, which functioned to disenfranchise thousands of the State's Puerto Rican residents. See STONE ET AL., *supra* note 63, at 222.

140. 400 U.S. 112 (1970).

141. 446 U.S. 156 (1980).

142. *City of Rome*, 446 U.S. at 173.

143. See Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 2 (1991) (noting that the VRA "demands the intimate involvement of the courts in state and local electoral systems, even to the extent of setting aside longstanding political arrangements").

144. See, e.g., Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179, 1205 (2001) [hereinafter Katz, *Federalism, Preclearance, and the Rehnquist Court*] (noting that compliance with a ban on racially discriminatory effects require those governed by it to consider race expressly or risk violating the proscription); Daniel Hays Lowenstein, *You Don't Have to be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 825 (1998) (noting that under both § 2 and § 5 of the VRA "race is a privileged criterion" and that "[t]he legislature and everyone who participates in the process must begin with race"); Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 107 (2000) (describing the Court's "implicit recognition that race-based districting to avoid retrogression may well be required to satisfy the effect prong of section 5 preclearance scrutiny"); Lisa Erickson, Comment, *The Impact of the Supreme Court's Criticism of the Justice Department in Miller v. Johnson*, 65 MISS. L.J. 409, 421 (1995) (noting that § 5 requires covered jurisdictions to "consider race in implementing new voting practices in order to achieve equal opportunity in voting rights").

145. See Drew S. Days III, *Section 5 and the Role of the Justice Department, in* CONTROVERSIES IN MINORITY VOTING 52, 53 n.2 (Bernard Grofman & Chandler Davidson eds., 1992); Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C. L. REV. 189, 191 (1983).

Most notably, they accord considerable deference to congressional judgments regarding the necessity of the measures.<sup>146</sup> *Katzenbach v. Morgan*,<sup>147</sup> for example, upheld as appropriate enforcement legislation section 4(e) of the VRA of 1965. The statute blocked New York from administering an English literacy requirement that functioned to disenfranchise large segments of New York City's Puerto Rican community.<sup>148</sup> *Morgan* states that Congress could have concluded both that New York's requirement itself constituted "invidious discrimination in establishing voter qualifications,"<sup>149</sup> and that it fostered "discrimination in governmental services."<sup>150</sup> *Morgan* did not require specific congressional findings supporting these conclusions, nor did it even mandate that Congress had in fact reached such conclusions about section 4(e)'s necessity. Instead, the Court deemed it sufficient that Congress "might well have questioned" the facially neutral justifications the State proffered for its law,<sup>151</sup> and that the Court could "perceive a basis upon which the Congress might resolve the conflict as it did."<sup>152</sup> *Morgan* states: "It is not for us to review the congressional resolution" of the factors that informed that judgment.<sup>153</sup>

This deference, which several of the opinions in *Oregon v. Mitchell* echo,<sup>154</sup> and *Boerne* appears to condone,<sup>155</sup> contrasts noticeably with

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146. See, e.g., Nowak, *supra* note 1, at 1110 (noting that these decisions "granted great deference to Congress in controlling actions of state governments and private persons related to racial discrimination in voting").

147. 384 U.S. 641 (1966).

148. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 439 (codified at 42 U.S.C. § 1973b(e) (2000)).

149. *Katzenbach v. Morgan*, 384 U.S. at 654.

150. *Id.* at 653.

151. *Id.* at 654-55.

152. *Id.* at 653.

153. *Id.*

154. *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (opinion of Black, J.) (stating that Congress "could have found" that literacy tests had racially disparate effects and "could have concluded" that "condition[ing]" the vote on literacy violates the Equal Protection Clause); *id.* at 147 (Douglas, J., dissenting in part, concurring in part) (stating that Congress "need not make findings as to the incidence of literacy," and that the legislative history revealed that Congress was "influenced" by a host of relevant factors); *id.* at 216 (Harlan, J., dissenting in part, concurring in part) (finding the issue "not free from difficulty," and concluding that "[d]espite lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application"); *id.* at 216 n.94 (Harlan, J., dissenting in part, concurring in part) (stating that legislative history from the 1965 Act sufficed to justify the 1970 ban on literacy tests and noting that "[w]hether to engage in a more particularized inquiry into the extent and effects of discrimination, either as a condition precedent or as a condition subsequent to suspension of literacy tests, was a choice for Congress to make"); *id.* (Harlan, J., dissenting in part, concurring in part) (noting that "[w]hile a less sweeping approach in this delicate area might well have been appropriate, the choice which Congress made was within the range of reasonable."); *id.* at 233 (Brennan, J., dissenting in part, concurring in part) (stating that "[c]ongressional power to remedy the evils resulting from state-sponsored racial discrimination

the increasingly rigorous review employed in the *Boerne* cases.<sup>156</sup> And yet, the *Boerne* cases do not purport to overrule the VRA precedent. Indeed, they self-consciously leave this precedent largely intact.<sup>157</sup> *Boerne* cites each of the provisions upheld in the VRA quartet from *South Carolina v. Katzenbach* through *City of Rome* as permissible enforcement legislation, despite both “the burden those measures placed on the States” and their proscription of constitutional conduct.<sup>158</sup> *Boerne*’s progeny, with perhaps somewhat less vigor, likewise invoke the earlier VRA provisions as examples of permissible congressional action, and cite the decisions upholding them as so establishing.<sup>159</sup>

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does not end when the subject of that discrimination removes himself from the jurisdiction in which the injury occurred”).

155. *City of Boerne v. Flores*, 521 U.S. 507, 528 (1997) (stating that “[b]oth rationales for upholding § 4(e) rested on unconstitutional discrimination by New York and Congress’ reasonable attempt to combat it”); see also *infra* Part III.

156. See, e.g., William G. Buss, *An Essay on Federalism, Separation of Powers, and the Demise of the Religious Freedom Restoration Act*, 83 IOWA L. REV. 391, 417 (1998) (stating that *Boerne* “ignores the *Morgan* limitation that the Court ‘be able to perceive’ a basis for Congress’s judgment”); Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, *supra* note 20, at 1143 (arguing that *Boerne* “departed sharply from the longstanding tradition of deferential means-ends scrutiny”); Dorf & Friedman, *supra* note 128, at 91 n.126 (contrasting approach of Court in *Boerne* with its approach in *City of Rome*); Karlan, *Two Section Twos and Two Section Fives*, *supra* note 136, at 726 (discussing implications of *Boerne* for §§ 2 and 5 of the Voting Rights Act); Post & Siegel, *supra* note 5, at 478-79 (noting tension between *United States v. Morrison* and *Oregon v. Mitchell*); Bernard Schwartz, *A Presidential Strikeout, Federalism, RFRA, Standing, and Stealth Court*, 33 TULSA L.J. 77, 84 (1997) (arguing that the *Boerne* rationale “is essentially inconsistent with that of *Morgan* . . . and “without acknowledging it, *Boerne* adopts the approach urged by Justice Harlan in his *Morgan* dissent”); John Matthew Guard, Comment, “Impotent Figureheads”? State Sovereignty, Federalism, and the Constitutionality of Section 2 of the Voting Rights After *Lopez v. Monterey County* and *City of Boerne v. Flores*, 74 TUL. L. REV. 329 (1999) [hereinafter Guard, *Impotent Figureheads*]; see also Eisgruber & Sager, *supra* note 118, at 95-96 (arguing that *Boerne*’s distinction between remedial- and rights-defining enactments by Congress was a self-conscious echo of Harlan’s dissenting views in *Morgan* and *Mitchell*). But cf. John Gatliff, *City of Boerne v. Flores Wrecks RFRA: Searching for Nuggets Among the Rubble*, 23 AM. INDIAN L. REV. 285, 348 (1998/99) (stating that *Boerne*’s preservation of the earlier VRA cases “allow[s] Congress to strike preemptively against proven forms of discrimination”).

157. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001) (contrasting abrogation of immunity in ADA with the VRA provisions upheld in *South Carolina v. Katzenbach*); *United States v. Morrison*, 529 U.S. 598, 626-27 (2000) (contrasting VAWA with statutory provisions upheld in *South Carolina v. Katzenbach* and *Katzenbach v. Morgan*); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 88-89 (2000) (discussing *South Carolina v. Katzenbach*); *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 639 & n.5 (1999) (citing, as a point of contrast, the VRA quartet); *Boerne*, 521 U.S. at 518 (citing VRA quartet as examples of permissible enforcement legislation). The notable exception is *Boerne*’s rejection of *Katzenbach v. Morgan*’s suggestion that Congress may expand the rights protected by the Equal Protection Clause. See *City of Boerne v. Flores*, 521 U.S. 507, 527-28 (1997).

158. *Katzenbach v. Morgan*, 521 U.S. at 518.

159. *Hibbs*, 123 S. Ct. at 1982 (citing the VRA provisions upheld in *South Carolina v. Katzenbach* as examples of permissible congressional measures to address a serious problem); *Garrett*, 531 U.S. at 373 (stating that the ADA’s “constitutional shortcomings are apparent” when compared with the VRA provisions upheld in *South Carolina v. Katzenbach*);

The Court has nevertheless been unable to distinguish convincingly the statutory regimes the VRA decisions upheld from those struck down under the *Boerne* doctrine. Geographic restrictions,<sup>160</sup> statutorily mandated expiration dates,<sup>161</sup> and documented examples of flagrant and pervasive underlying unconstitutional conduct<sup>162</sup> distinguish some, but not all, of the provisions preserved. And *Boerne* itself insists that valid Section 5 legislation does not require "termination dates, geographic restrictions, or egregious predicates."<sup>163</sup> None of these elements, moreover, explains the markedly different degrees of deference employed by the Court in the earlier VRA cases, on the one hand, and the *Boerne* cases, on the other.<sup>164</sup> In short, the *Boerne* cases appear to be doctrinally irreconcilable with the earlier VRA precedent they purport to preserve.<sup>165</sup>

To be sure, in *Boerne* and its progeny, the Court's preservation of the cases from *South Carolina v. Katzenbach* through *City of Rome* may signify nothing more than its unwillingness to overrule these

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*Morrison*, 529 U.S. at 626 (describing VAWA as "unlike" the remedies upheld in *Katzenbach v. Morgan* and *South Carolina v. Katzenbach*); *Kimel*, 528 U.S. at 89 (contrasting congressional record supporting ADEA's abrogation of state immunity with that underlying the VRA provisions upheld in *South Carolina v. Katzenbach*); *Coll. Sav. Bank*, 527 U.S. at 639 n.5 (invoking *Boerne*'s discussion of the VRA quartet to distinguish the statutory provision in dispute).

160. See, e.g., *City of Rome v. United States*, 446 U.S. 156 (1980) (upholding § 5 of the VRA, as extended in 1975).

161. See *City of Rome*, 446 U.S. at 180-81 (upholding extension of § 5, as extended for seven years); *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (opinion of Black, J.) (upholding nationwide five-year suspension of literacy tests); *South Carolina v. Katzenbach*, 383 U.S. at 337 (upholding § 4(a) of the VRA, imposing a five-year ban on literacy tests in covered jurisdictions, and the § 5 preclearance process, as limited by the five-year ban). Congress subsequently made the nationwide ban on literacy tests permanent. See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 201, 89 Stat. 400, 400 (codified as amended at 42 U.S.C. § 1973aa (2000)).

162. *Mitchell*, 400 U.S. at 132 (opinion of Black, J.) (noting that "[i]n enacting the literacy test ban . . . Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race"); *South Carolina v. Katzenbach*, 383 U.S. at 308-29 (noting extensive congressional findings of discriminatory conduct supporting imposition of preclearance requirement on covered jurisdictions). But compare *Morrison*, 529 U.S. at 626 (rejecting as inadequate extensive congressional findings of state misconduct in criminal justice administration where findings did not document misconduct in every State), with *Mitchell*, 400 U.S. at 284 (Stewart, J., concurring in part and dissenting in part) (upholding nationwide ban on literacy tests despite absence of state-by-state findings), and *Katzenbach v. Morgan*, 384 U.S. at 646-47 (upholding nationwide prohibition on English literacy tests despite absence of specific findings supporting unconstitutional use of such tests). See generally Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique*, *Morrison*, and the Future of Antidiscrimination Law, 2000 SUP. CT. REV. 109, 156 (noting tension between *Morrison* and *Mitchell*); Post & Siegel, *supra* note 5, at 478-79 (same).

163. *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997).

164. See sources cited *supra* notes 146 and 156 and accompanying text.

165. See *supra* note 157 and accompanying text.

older, historically resonant decisions.<sup>166</sup> And yet, the Court's nearly unanimous post-*Boerne* affirmation of the constitutionality of a broad construction of section 5 of the VRA compels a more broad understanding of the Court's preservation of these prior decisions. At issue in *Lopez v. Monterey County*<sup>167</sup> was whether a jurisdiction subject to section 5 of the VRA must seek and obtain preclearance prior to implementing nondiscretionary electoral changes.<sup>168</sup> Monterey County is a covered jurisdiction under the VRA,<sup>169</sup> meaning that it may not enact or seek to administer electoral rules unless it receives federal judicial or administrative preclearance.<sup>170</sup> It must demonstrate, either to the Attorney General or to the federal district court in Washington, D.C., that a proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or membership in a language-minority group.<sup>171</sup> The dispute in *Lopez* arose because Monterey County had not obtained preclearance prior to implementing changes to its system for electing judges.

*Lopez* holds that section 5 of the VRA requires preclearance of the changes, even if state law mandated them and the County exercised no discretion in implementing them. Justice O'Connor's majority opinion holds that nondiscretionary conduct by a covered jurisdiction must be precleared because it may produce a racially discriminatory effect.<sup>172</sup> Nondiscretionary conduct, however, necessarily lacks the discriminatory motivation needed to violate the Constitution.<sup>173</sup> Thus a

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166. Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1594 (2002) [hereinafter Karlan, *Easing the Spring*] (describing the VRA as the "crown jewel of the Second Reconstruction" and suggesting that the Court "has been unwilling to use strict scrutiny to dismantle [it]").

167. 525 U.S. 266 (1999).

168. See generally Katz, *Federalism, Preclearance, and the Rehnquist Court*, *supra* note 144, at 1202-03 (discussing relationship of *Boerne* and *Lopez*).

169. See *Lopez v. Monterey County*, 525 U.S. 266, 271 (1999) (interpreting the Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 4-5, 79 Stat. 437, 438-39 (codified as amended at 42 U.S.C. §§ 1973b(b), (c), 1973c (2000))). A jurisdiction was "covered" if, on the date the VRA became effective, it employed as a prerequisite to voting devices such as a literacy, understanding, subject-matter, or moral-character test, and less than fifty percent of the voting-age population was registered or actually voted in the presidential election of 1964. See § 4(b), (c), 79 Stat. at 438-39 (defining which jurisdictions were covered). As Congress extended § 5 in 1970, 1975, and 1982, dates subsequent to 1964 were selected for comparative measurements.

170. 42 U.S.C. § 1973c (2000).

171. Voting Rights Amendments of 1975, Pub. L. No. 94-73, § 206, 89 Stat. 400, 402 (codified as amended at 42 U.S.C. §§ 1973-1973d, 1973k (2000)). Covered jurisdictions may seek preclearance either from the Attorney General or from the district court in D.C. See 42 U.S.C. § 1973c (2000).

172. See *Lopez*, 525 U.S. at 283.

173. See *Mobile v. Bolden*, 446 U.S. 55, 61-62 (1980) (plurality opinion of Stewart, J.) (holding that "action by a State that is racially neutral on its face violates the Fifteenth

proscription against such conduct, even where discriminatory in effect, seemingly lacks any linkage to unconstitutional action. Under *Boerne* and its progeny, such a proscription would appear to be beyond Congress's enforcement powers.<sup>174</sup> To be sure, the prior bad acts that trigger the coverage designation under section 5 suggest a linkage between discriminatory effects and invidious intent.<sup>175</sup> Section 5 eliminates the presumption of validity that typically attaches to governmental decisionmaking and shifts "the burden of inertia" to covered jurisdictions to justify the legality of their conduct.<sup>176</sup> Within this framework, invidious intent may be assumed to underlie discretionary conduct that produces a racially discriminatory effect. And yet, that assumption is not plausible where the conduct in question is nondiscretionary.

The Court in *Lopez* dismisses this concern. Justice O'Connor states simply "that Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions."<sup>177</sup> Nondiscretionary changes can have such an effect, and thus Congress may require covered jurisdictions to obtain preclearance of them. "[T]he Voting Rights Act, by its nature, intrudes on state sovereignty," she concludes. "The Fifteenth Amendment permits this intrusion . . . and our holding today adds nothing of constitutional moment to the burdens that the Act imposes."<sup>178</sup> In other words, this process may be intrusive,<sup>179</sup> but it falls well within Congress's enforcement powers to mandate. The section 5 preclearance process infringes on state sovereignty and *Lopez* affirms that this infringement is constitutionally permissible.<sup>180</sup>

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Amendment only if motivated by a discriminatory purpose"); *Washington v. Davis*, 426 U.S. 229, 239-41 (1976) (discussing the Fourteenth Amendment's intentionality requirement).

174. See *supra* text accompanying note 128.

175. See *Lopez*, 525 U.S. at 294-95 (Thomas, J., dissenting) (discussing this justification for § 5 of the VRA).

176. See *Beer v. United States*, 425 U.S. 130, 140 (1976) (noting that Congress passed § 5 in response to the practice of some jurisdictions of passing new discriminatory voting laws as soon as the old ones had been struck down, and accordingly "to shift the advantage of time and inertia from the perpetrators of the evil to its victim" by "freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory").

177. *Lopez*, 525 U.S. at 283.

178. *Id.* at 284-85.

179. See also Lowenstein, *supra* note 144, at 790 (describing preclearance process as "an unprecedented federal intrusion into the governing processes of the states.").

180. *Lopez*, 525 U.S. at 284. *Lopez*, in fact, references not just § 5 but the Voting Rights Act in its entirety. *Id.*



The Court had previously upheld congressional authority to enact section 5.<sup>181</sup> It had not addressed, however, the constitutionality of the statute as extended in 1982 or its validity under the *Boerne* framework.<sup>182</sup> These latter developments had significantly called into question the validity of section 5's application to nondiscretionary conduct, and, more broadly, the validity of the preclearance process itself. And yet, *Lopez* blithely dispenses with them. Justice O'Connor cites *Boerne* but once, and then for the proposition that Congress's enforcement power includes the power to prohibit constitutional conduct and intrude deeply into state sovereign process.<sup>183</sup> *Lopez* ignores the factors that have emerged as central to *Boerne*'s congruence-and-proportionality inquiry, making no mention, for example, of the congressional findings underlying the 1982 extension of section 5.<sup>184</sup> Instead, Justice O'Connor affirms the validity of section 5 based on *South Carolina v. Katzenbach* and *City of Rome*, both of which upheld earlier versions of section 5 based on distinct legislative findings and historical circumstances.<sup>185</sup>

Remarkably, Justice O'Connor's opinion is joined not only by Justices Stevens, Souter, Ginsburg, and Breyer, all of whom dissented in

181. See *City of Rome v. United States*, 446 U.S. 156, 183 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); see also Guard, *Impotent Figureheads*, *supra* note 156, at 357 (arguing that principles of stare decisis support the Court's holding in *Lopez*).

182. *Lopez* was decided the same Term as the *Florida Prepaid* and *College Savings Bank* decisions, both of which developed and extended the *Boerne* decision. See Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, *supra* note 20, at 1147-49 (discussing application of *Boerne* in the *Florida Prepaid* and *College Savings Bank* decisions).

183. *Lopez*, 525 U.S. at 282-83:

As the Court recently observed with respect to Congress' power to legislate under the Fourteenth Amendment "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States."

*Id.* (quoting *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997)) (alteration in original).

184. To be sure, the adequacy of congressional findings has become increasingly central in the Court's congruence-and-proportionality analysis in decisions post-dating *Lopez*. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370-74 (2001); *id.* at 380-85 (Breyer, J., dissenting); *United States v. Morrison*, 529 U.S. 598, 626 (2000); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 89-91 (2000); see also *supra* notes 122-124 and accompanying text (discussing treatment of legislative findings in the *Boerne* decisions). Even so, *Boerne* addresses the congressional findings underlying the RFRA in some detail, and months after *Lopez*, *Florida Prepaid* again considered such findings to be of significant import. See *Florida Prepaid*, 527 U.S. at 639; *Boerne*, 521 U.S. 507, 530-31 (1997).

185. See *Lopez*, 525 U.S. at 282-84; see also *City of Rome*, 446 U.S. at 180-82 (discussing congressional findings supporting the 1975 extension of the Act and agreeing that the need for the extension was "unsurprising and unassailable" and that it was "plainly a constitutional method of enforcing the Fifteenth Amendment"); *South Carolina v. Katzenbach*, 383 U.S. at 308-09 (noting extensive congressional findings underlying the 1965 VRA).

*Boerne's* progeny,<sup>186</sup> but also by Justice Scalia, who voted with the majority in all of the *Boerne* decisions.<sup>187</sup> So too, the Chief Justice and Justice Kennedy, who concur in *Lopez*, and Justice Thomas, who dissents, express no qualms about the validity of section 5, as amended in 1982.<sup>188</sup> The Chief Justice and Justice Kennedy disagree with the majority that section 5 of the VRA applies to nondiscretionary electoral changes. They concur in the judgment because they thought Monterey had exercised discretionary judgments in the case before the Court.<sup>189</sup> Justice Kennedy's opinion identifies no constitutional difficulty with section 5, so construed. Justice Thomas dissents alone, arguing that the Court's construction of section 5 contravenes *Boerne's* congruence-and-proportionality standard. Requiring preclearance of nondiscretionary changes, he states, fails to remedy any constitutional wrong.<sup>190</sup> But even Justice Thomas did not suggest that section 5 itself, as amended in 1982, is suspect under the *Boerne* doctrine. *Lopez's* affirmation of section 5 was not, accordingly, the product of a divided Court.

Of course, this affirmation could be of only limited significance. *Lopez*, after all, was primarily a case about a relatively narrow question of statutory interpretation and did not present a direct challenge to the constitutionality of the statute. The case was not litigated as a vehicle to explore the scope of congressional power under the Constitution.<sup>191</sup> At the time, the *Boerne* decision was nearly two-years old, and while the *Florida Prepaid* cases were pending, the Court might not yet have appreciated the potential breadth of the *Boerne* doctrine. Justice Thomas nevertheless alerted the Court that its construction of section 5 of the VRA implicated serious constitutional questions under *Boerne* and the Court responded with sweeping language affirming exceptionally broad congressional power.

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186. See *Garrett*, 531 U.S. at 376 (Breyer, J., dissenting); *Morrison*, 529 U.S. at 655 (Breyer, J., dissenting); *Kimel*, 528 U.S. at 92 (Stevens, J., dissenting); *Coll. Sav. Bank*, 527 U.S. at 691 (Stevens, J., dissenting); *id.* at 693 (Breyer, J., dissenting); *Florida prepaid*, 527 U.S. at 648 (Stevens, J., dissenting).

187. Justice O'Connor likewise joined the majority in *Boerne's* progeny, but dissented in *Boerne* itself because of her disagreement with the Court's analysis in *Employment Division v. Smith*, 494 U.S. 872 (1990). See *Boerne*, 521 U.S. at 544 (O'Connor, J., dissenting); *Florida Prepaid*, 527 U.S. at 648 (Stevens, J., dissenting).

188. *Lopez*, 525 U.S. at 288 (Kennedy, J., concurring in the judgment); *id.* at 289-98 (Thomas, J., dissenting).

189. *Id.* at 288-89 (Kennedy, J., concurring in the judgment).

190. See *id.* at 295-96 (Thomas, J., dissenting) (arguing that nondiscretionary actions cannot be motivated by unconstitutional conduct, and accordingly that Congress cannot reach them through enforcement legislation).

191. See, e.g., State Appellee's Brief on the Merits, *Lopez v. Monterey County*, 525 U.S. 266 (1999) (No. 97-1396); Brief for Appellee Monterey County, *Lopez* (No. 97-1396); Brief on the Merits for Appellant, *Lopez* (No. 97-1396).

As a result, *Lopez* magnifies the import of the Court's preservation of the VRA quartet in the *Boerne* decisions.<sup>192</sup> Like the VRA decisions and in contrast to the *Boerne* cases themselves, *Lopez* defers to congressional judgments regarding how best to enforce the Reconstruction Amendments.<sup>193</sup> It suggests that stare decisis alone does not explain the Court's insistence that the cases from *South Carolina v. Katzenbach* to *City of Rome* remain good law. Instead, *Lopez* suggests that the Rehnquist Court not only accepts the measures upheld in the VRA quartet but actually prospectively embraces congressional power to intervene intrusively into state affairs to block racial discrimination in the political process.

B. *Attempting Reconciliation: Voting Rights "Proper" in the Rehnquist Court*

The Rehnquist Court's determined preservation of the VRA precedent and its broad affirmation of federal power in *Lopez* appear even more puzzling given much of the Court's other contemporary voting-rights jurisprudence. The Court has repeatedly, albeit not exclusively,<sup>194</sup> read the VRA parsimoniously.<sup>195</sup> These narrow readings of the VRA contrast with prior precedent<sup>196</sup> and adopt strained readings of congressional intent.<sup>197</sup> These decisions thus seem to ignore the deference the *Boerne* decisions and *Lopez* suggest Congress enjoys

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192. See RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 129-30 (2003).

193. See *supra* note 183 and accompanying text.

194. See, e.g., *Lopez*, 525 U.S. 266 (1999) (adopting a broad construction of § 5 to require preclearance of nondiscretionary electoral changes implemented by a covered jurisdiction); *Young v. Fordice*, 520 U.S. 273, 290 (1997) (requiring preclearance of a State's implementation of separate registration systems for federal and state elections after the National Voter Registration Act had set parameters for federal elections); *Lopez v. Monterey County*, 519 U.S. 9 (1996) (construing broadly § 5 to block elections planned under an unprecleared statute, even when the result may leave the jurisdiction without an electoral system); *Clark v. Roemer*, 500 U.S. 646, 652 (1991) (adopting broad construction of § 5 to hold that judicial elections held pursuant to unprecleared statutes should have been enjoined).

195. See, e.g., *Bossier Parish II*, *supra* note 30, 528 U.S. 320 (2000) (construing the purpose prong of the VRA's § 5 to proscribe retrogressive intent and not an intent to dilute or invidious intent more generally); *Bossier Parish I*, *supra* note 30, 520 U.S. 471 (1997) (holding that § 5 does not block preclearance of voting changes that violate § 2 of the VRA); *Abrams v. Johnson*, 521 U.S. 74 (1997) (adopting narrow construction of § 5 that deemed nonretrogressive a districting plan under which a black-majority district went from representing one-tenth of the State's delegation to one-eleventh); *Holder v. Hall*, 512 U.S. 874 (1994) (holding § 2 of the VRA inapplicable to a challenge to the size of a local governing structure); *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992) (holding § 5 of the VRA inapplicable to reallocation of authority among elected officials).

196. See, e.g., *Allen v. Bd. of Elections*, 393 U.S. 544, 566-67 (1969) (finding that Congress intended § 5 to have "the broadest possible scope" and to reach "any state enactment which altered the election law of a covered State in even a minor way").

197. See *infra* note 225 and text accompanying note 243.

when legislating to block racial discrimination in voting.<sup>198</sup> *Shaw v. Reno*<sup>199</sup> and its progeny,<sup>200</sup> moreover, hinder the easy imposition of race-conscious districting practices that are central to the VRA's plan to foster political participation by racial minorities. Several scholars have charged that the *Shaw* cases manifest hostility to the political gains made by African Americans and other racial minorities as a consequence of the VRA and the Second Reconstruction more generally.<sup>201</sup>

These cases may be understood, however, as expressing a more particular concern. They manifest the Court's resistance to a particular type of race-conscious decisionmaking within the political process. The Court seeks not to mandate colorblindness,<sup>202</sup> but instead to

198. See *supra* notes 180-185 and accompanying text.

199. 509 U.S. 630 (1993).

200. *Easley v. Cromartie*, 532 U.S. 1076 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995).

201. See, e.g., KOUSSER, *supra* note 1; A. Leon Higginbotham Jr. et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 *FORDHAM L. REV.* 1593, 1603 (1994) (suggesting that *Shaw* might be the "equivalent for the civil-rights jurisprudence of our generation to what *Plessy v. Ferguson* and *Dred Scott v. Sandford* were for prior generations"); Karlan, *End of the Second Reconstruction?*, *supra* note 1, at 699 (arguing that *Shaw* "perversely used the equal protection clause . . . to make it harder for blacks to reap the benefits of reapportionment available to other cohesive groups"); Laughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 *MISS. L.J.* 271, 273-74 (1995) (arguing the Court "has launched a counterrevolution which threatens to overthrow the gains in minority office holding so laboriously accumulated over the past 30 years"); Nowak, *supra* note 1, at 1113 (arguing that the *Shaw* decisions "made it impossible for the Attorney General to order or even encourage a state or local legislature to create legislative district lines in a way that would strengthen minority race voting power"); Jamie B. Raskin, *Affirmative Action and Racial Reaction*, 38 *HOW. L.J.* 521, 526-28 (1995) (describing *Shaw*'s "naked and unprincipled pursuit of inequality" and arguing that "[u]nless it is assumed that whites have a presumptive constitutional right to be in a political majority, *Shaw* makes no sense").

202. The Rehnquist Court periodically celebrates colorblind decisionmaking, and some Justices laud it as a virtue and a constitutional mandate. See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 512 (2000) (discussing the Fifteenth Amendment's "mandate of neutrality"); *Vera*, 517 U.S. at 999 (Thomas, J., concurring in judgment) (disagreeing "that strict scrutiny is not invoked by the intentional creation of majority-minority districts"); *Miller*, 515 U.S. at 904 (noting that the "central mandate" of the Equal Protection Clause "is racial neutrality in governmental decisionmaking"); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in judgment) (stating that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction"); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting) (discussing "the cardinal rule that our Constitution protects each citizen as an individual, not as a member of a group"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring in judgment) (same); *id.* at 518 (Kennedy, J., concurring in part and concurring in judgment) (noting that "[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause").

*Shaw* and its progeny do not, however, require race-neutral districting. Racially predominant districting is subject to strict scrutiny, while racially informed districting practices do not even trigger heightened review. See *Easley*, 532 U.S. 234 (2001) (finding that race was considered in the redistricting process, but that it was not the predominant factor and thus that strict scrutiny was not required); see also Karlan, *Easing the Spring*, *supra* note 166, at

restrict what it sees as excessive reliance on racial factors. To date, it has deemed such reliance excessive when it has found that race had been used mechanically, visibly, and decisively in the absence of congressional authorization.<sup>203</sup>

*Shaw* and its progeny identify an “analytically distinct” cause of action under the Equal Protection Clause that calls for the application of strict scrutiny when legislatures subordinate traditional districting factors to racial considerations, that is, when race is the predominant factor motivating the districting decision.<sup>204</sup> *Shaw* itself focused on the unusual or “bizarre” shape of the challenged district, emphasizing that “reapportionment is one area in which appearances do matter.”<sup>205</sup> Subsequent decisions hold that the inquiry focuses on whether race-based intent trumps other districting concerns, with district shape offering probative (but not necessary) evidence of such intent.<sup>206</sup>

The Court has never, however, struck down a districting plan under *Shaw* that it thought Congress meant to require. The state defendants in each of the *Shaw* cases claimed that the dictates of the VRA mandated and thus justified the districting plans under challenge.<sup>207</sup> In response, *Shaw*’s progeny are careful to hold that the VRA, as enacted, amended, and subsequently interpreted by the Court,<sup>208</sup> did not require the districting choice disputed in each case.<sup>209</sup>

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1573 (noting that “under the predominant purpose standard, not every use of race renders a plan constitutionally suspect”).

203. The Court’s recent decision in *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003), supports this view. See *infra* notes 226-228 and accompanying text.

204. *Miller*, 515 U.S. at 916.

205. *Shaw v. Reno*, 509 U.S. 630, 647 (1993); see also Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993) (describing the analytical structure of the *Shaw* injury).

206. See *Miller*, 515 U.S. at 916 (discussing plaintiff’s burden); see also Richard H. Pildes, *Is Voting-Rights Now at War with Itself? Social Science and Voting Rights in the 2000’s*, 80 N.C. L. REV. 1517 (2002) [hereinafter Pildes, *Is Voting-Rights Now at War with Itself?*]; Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2539-40, 2548-50 (1997) (discussing importance of district shape under *Shaw* and its progeny).

207. *Vera*, 517 U.S. at 977-83; *Shaw v. Hunt*, 517 U.S. 899, 911 (1996); *Miller*, 515 U.S. at 925-28; *Shaw v. Reno*, 509 U.S. at 653-58.

208. See *Thornburg v. Gingles*, 478 U.S. 30, 48-51 (1986) (construing the 1982 Amendments to § 2 of the Voting Rights Act as authorizing a three-part test for vote dilution); see also William N. Eskridge, *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 652 n.224 (1991) (describing the *Gingles* Court as “very liberally” applying the 1982 VRA Amendments).

209. See *Vera*, 517 U.S. at 976-79; *Hunt*, 517 U.S. at 911-16; *Miller*, 515 U.S. at 923-27. Admittedly narrow readings of the statute enabled the Court to so hold. See, e.g., Rubin, *supra* note 144, at 106; cf. *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1465-66 (M.D. Ala. 1988) (rejecting, prior to *Shaw*, the notion that “a proposed district must meet, or attempt to achieve, some aesthetic absolute, such as symmetry or attractiveness”

Indeed, five Justices expressly held, and the remaining four assumed, that compliance with the VRA constitutes an interest sufficiently compelling to justify the predominately racial-districting practices that would otherwise violate the Equal Protection Clause.<sup>210</sup>

Absent this assumption, the *Shaw* cases would significantly narrow the realm in which congressional action is permissible. Recognition of a new claim under the Equal Protection Clause might seemingly be thought to enlarge the realm in which Congress may act by giving it an additional right to enforce. But absent power to define compelling interests within the *Shaw* framework, any additional authority derived from the *Shaw* decisions would necessarily encroach upon Congress's existing Section 5 power to combat racial vote dilution and other defects in the political process. The result would be not simply a reallocation of congressional power under Section 5, but a significant curtailment of it, much in the same way that the obligation to comply with both the *Shaw* decisions and the VRA circumscribes the range of districting options available to state districting authorities.<sup>211</sup>

The assumption that compliance with the VRA constitutes a compelling interest under *Shaw* suggests that race may predominate in districting decisions when Congress mandates it.<sup>212</sup> Put differently, the *Shaw* decisions suggest that what otherwise might be deemed unconstitutional conduct becomes lawful when authorized by Congress to block racial discrimination in voting. To be sure, the *Shaw* decisions

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and that "compactness" within the meaning of *Gingles*, and § 2 of the VRA is a "functional concept" that is met when "effective[] represent[ation]" is possible).

210. See *Vera*, 517 U.S. at 977 (plurality opinion) ("[W]e assume without deciding that compliance with the [§ 2] results test . . . can be a compelling state interest"); *id.* at 990, 990-92 (O'Connor, J., concurring) (stating that "compliance with the results test of VRA § 2(b) is a compelling state interest"); *id.* at 1004 (Stevens, J., dissenting) (stating that "[e]ven if strict scrutiny applies, I would find these districts constitutional, for each considers race only to the extent necessary to comply with the State's responsibilities under the Voting Rights Act while achieving other race-neutral political and geographical requirements"); *id.* at 1046 (Souter, J., dissenting) (describing as significant Justice O'Connor's concurring position "that compliance with § 2 of the Voting Rights Act is a compelling state interest"); *Hunt*, 517 U.S. at 915 ("We assume, *arguendo*, for the purpose of resolving this suit, that compliance with § 2 could be a compelling interest . . .").

211. See, e.g., Stevens's dissent in *Vera*:

Given the difficulty of reconciling these competing legal responsibilities, the political realities of redistricting, and the cost of ongoing litigation, some States may simply step out of the redistricting business altogether, citing either frustration or hopes of getting a federal court to resolve the issues definitively in a single proceeding.

*Vera*, 517 U.S. at 1036-38 (Stevens, J., dissenting) (citation omitted); see also *id.* at 1045-46 (Souter, J., dissenting) ("The price of *Shaw I*, indeed, may turn out to be the practical elimination of a State's discretion to apply traditional districting principles, widely accepted in States without racial districting issues as well as in States confronting them.").

212. See Karlan, *Easing the Spring*, *supra* note 166, at 1586-87 (stating that the assumption that compliance with the VRA can constitute a compelling interest "raise[s] the possibility that congressional or executive understandings of equality that go beyond what the Constitution itself requires can provide a justification for race-conscious state action").

hardly accord Congress unlimited discretion in this realm. They strongly imply, for example, that the mandates of the Equal Protection Clause preclude Congress from requiring purely race-based districting.<sup>213</sup> The *Shaw* decisions nevertheless imply that the Court thinks special solicitude is appropriate when Congress frames measures to block racial discrimination in voting.

This solicitude is absent, however, when decisionmakers act in the absence of congressional authorization. In the *Shaw* cases, the Court found that the state defendants permitted race to predominate in the absence of congressional authorization. Instead, the Court concluded that each districting plan had been shaped by the actual or anticipated demands of the Department of Justice within the preclearance process. As noted earlier,<sup>214</sup> under section 5 of the VRA, covered jurisdictions must demonstrate, either to the Attorney General or to the federal district court in Washington, D.C., that a proposed change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color” or membership in a language minority group.<sup>215</sup> The effects-based prong of this standard, in contrast to its prohibition on intentional racial discrimination, necessarily requires racially informed decisionmaking.<sup>216</sup> But while the Rehnquist Court accepts as permissible race-consciousness of this sort,<sup>217</sup> it has long thought that the DOJ has relied excessively on race in exercising its authority within the section 5 preclearance process.<sup>218</sup> Several decisions charge that the DOJ has impermissibly required covered jurisdictions to create the maximum number of black-majority districts possible, regardless of whether such districts captured communities of interest.<sup>219</sup> The Court has held that the DOJ’s pursuit of

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213. See, e.g., *Miller*, 515 U.S. at 915-16.

214. See *supra* note 170 and accompanying text.

215. 42 U.S.C. §§ 1973c, 1973b(f)(2) (2000); Act of Aug. 6, 1975, Pub. L. No. 94-73, § 201, 89 Stat. 400, 401 (1975). Covered jurisdictions may seek preclearance either from the Attorney General or from the district court in D.C. See 42 U.S.C. § 1973c.

216. See *supra* note 144.

217. See, e.g., *Lopez v. Monterey County*, 525 U.S. 266 (1999); *supra* notes 165-178 and accompanying text.

218. See Katz, *Federalism, Preclearance, and the Rehnquist Court*, *supra* note 144, at 1180-81, 1212-14 (discussing the Rehnquist Court’s mistrust of the Department of Justice).

219. See, e.g., *Abrams v. Johnson*, 521 U.S. 74, 85-86 (1997) (noting that the Georgia legislature had “yielded to the Justice Department’s threats, [and] it also adopted the Justice Department’s entirely race-focused approach to redistricting — the max-black policy”); *id.* at 87 (finding “strong support . . . for finding the second majority-black district . . . resulted in substantial part from the Justice Department’s policy of creating the maximum number of majority-black districts”); *Shaw v. Hunt*, 517 U.S. 899, 913 (1996) (stating that “[i]t appears that the Justice Department was pursuing in North Carolina the same policy of maximizing the number of majority-black districts that it pursued in Georgia”); *Miller v. Johnson*, 515 U.S. 900, 917 (1995) (noting evidence of Georgia’s “predominant, overriding desire” to create three black-majority districts to satisfy Department of Justice); *id.* at 924 (noting that

this “black-max” policy violates the VRA and the Constitution.<sup>220</sup>

Concerned that the Department of Justice has relied excessively on race within the preclearance process, the Court has sought to rein in its powers. It has construed the VRA narrowly in several recent cases addressing DOJ’s section 5 powers. For example, the Court’s two decisions in the *Bossier Parish* cases limit the discretionary judgments available to DOJ when evaluating preclearance submissions. The first *Bossier Parish* decision holds that section 5 permits implementation of electoral changes that violate section 2 of the VRA.<sup>221</sup> It thereby largely removes from the ambit of the section 5 inquiry the multi-factored queries into the existence of racial vote dilution that occur under section 2.<sup>222</sup> The second *Bossier Parish* decision holds that sec-

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“[i]nstead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts”).

Scholars disagree about whether the Court’s perception of the Department of Justice’s conduct is accurate. Compare Lowenstein, *supra* note 144, at 780, 804-05, 813 (noting that the Department of Justice “forced” covered jurisdictions to create specific number of majority-minority districts and withheld preclearance unless they complied), and Timothy G. O’Rourke, Shaw v. Reno: *The Shape of Things to Come*, 26 RUTGERS L.J. 723, 750 (1995) (arguing that “the legal foundation for the Justice Department’s demand that North Carolina and Louisiana craft two majority black districts or that Georgia draw three black districts is, at best, dubious”), and Abigail Thernstrom, *More Notes from a Political Thicket*, 44 EMORY L.J. 911, 930 (1995) (noting concern “over the Justice Department’s coercive role in bending local jurisdiction to its will” and that Voting Rights Section “has long assumed freewheeling power to object to districting plans that did not seem ‘right’ — that is, racially ‘fair’”), with Rubin, *supra* note 144, at 105-06 (disputing Court’s characterization of the Justice Department’s conduct), and Terry Smith, *A Black Party?* Timmons, *Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1, 34 (1998) (suggesting that the Justice Department’s conduct disputed in *Abrams v. Johnson* was appropriate), and Thalia L. Downing Carroll, Casenote, *One Step Forward or Two Steps Back?* *Abrams v. Johnson* and the Voting Rights Act of 1965, 31 CREIGHTON L. REV. 917, 944-45 (1998) (same).

220. See, e.g., Shaw, 517 U.S. at 913 (noting that the Court “again reject[s] the Department’s expansive interpretation of § 5”); Miller, 515 U.S. at 921 (noting that “compliance with federal antidiscrimination law cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws”); *id.* at 925 (stating that “[i]n utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority beyond what Congress intended and we have upheld”); see also Katz, *Federalism, Preclearance, and the Rehnquist Court*, *supra* note 144, at 1212-13.

221. *Bossier Parish I*, *supra* note 30, 520 U.S. 471 (1997). Section 2 prohibits any voting “standard, practice, or procedure” that “results in a denial or abridgement of the right . . . to vote on account of race or color.” 42 U.S.C. § 1973(a) (2000). A voting practice is dilutive and violates § 2,

if, based on the totality of circumstances, it is shown that the political processes leading to the nomination or election in the State or political subdivision are not equally open to [members of the protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b) (1994).

222. While not unbounded, see S. REP. NO. 97-417, at 28-29 (1982) (listing factors informing totality of circumstances inquiry under § 2); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671-76 (2001), claims of racial vote dilution are indisputably complex. See, e.g., Samuel Issacharoff & Richard H. Pildes, *Not by ‘Election’ Alone*, 32 LOY. L.A. L. REV. 1173, 1182 (1999) (noting that minority vote dilution



tion 5 permits implementation of electoral changes implemented with a discriminatory, albeit nonretrogressive, intent.<sup>223</sup> It thus limits review to the facially straightforward assessment of retrogression, that is, whether the proposed change worsens the condition of members of a racial minority.<sup>224</sup> Both decisions reflect the Court's hope that by curbing the discretion exercised by DOJ under the statute, it will block the DOJ from relying too heavily on race and thereby overstepping its authority in the future.<sup>225</sup>

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cases lead "the courts into complex fields of effective representation, fair distribution of governmental resources, and finally, equitable allocation of governmental power").

Proof of vote dilution under § 2 requires establishment of the so-called *Gingles* preconditions. See *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (setting forth preconditions that a racial group "is sufficiently large and geographically compact to constitute a majority in a single-member district," that the group is "politically cohesive," and that the majority "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate"). Section 2 also requires evidence that the totality of circumstances supports the dilutive quality of the practice. See *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994).

223. See *Bossier Parish II*, *supra* note 30, 528 U.S. 320 (2000); see also Katz, *Federalism, Preclearance, and the Rehnquist Court*, *supra* note 144, at 1186-90 (discussing decision).

224. The Court's past affinity for retrogression may have reflected its view that the measure is objective, clear, and easy to administer. See, e.g., *Bush v. Vera*, 517 U.S. 952, 983 (1996) (noting that "[n]onretrogression . . . merely mandates that a minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions"); *Holder v. Hall*, 512 U.S. 874, 883-84 (1994) (noting "there is little difficulty in discerning the two voting practices to compare to determine whether retrogression would occur"); *Shaw v. Reno*, 509 U.S. 630, 655 (1993) (stating that "[a] reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression"). The standard, however, is more malleable than these decisions acknowledge. See, e.g., *Abrams*, 521 U.S. at 97 (holding nonretrogressive plan that reduces black-majority district from representing one-tenth of the State's congressional delegation to representing one-eleventh); Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 745-47, 749 (1998) (arguing that plan deemed nonretrogressive in *Abrams* left State's African-American population "quantitatively worse off" and that the Court's treatment of retrogression makes no sense). *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003), the Court's most recent section 5 decision, adopts a far more fluid understanding of retrogression, but nevertheless one that continues to curtail DOJ authority. See *infra* notes 226-233 and accompanying text.

225. See Katz, *Federalism, Preclearance, and the Rehnquist Court*, *supra* note 144, at 1213-16. Without doubt, these constructions of section 5 accord Congress far less deference than the *Boerne* decisions and *Lopez* suggest Congress should receive in the realm of race and the vote. See also *supra* notes 192-193 and accompanying text (discussing deference). The Court did not simply suspend *Chevron* deference *sub silentio*, but also circumscribed DOJ discretion beyond what Congress intended. See, e.g., Katz, *Federalism, Preclearance, and the Rehnquist Court*, *supra* note 144, at 1192-1200 (identifying ways in which the statutory constructions adopted in both decisions appear contrary to congressional intent); Rubin, *supra* note 144, at 92 (critiquing as "remarkable" and implausible the Court's assessment of congressional intent in the second *Bossier Parish* decision). It did so, however, not in resistance to congressional power to block racial discrimination in voting but instead to block the DOJ from violating the statute. The decisions do not themselves restrict congressional power to mandate the more broad readings of the statute rejected in each case. But see *Bossier Parish II*, 528 U.S. at 336 (speculating that the rejected construction of § 5 "perhaps . . . rais[es] concerns about § 5's constitutionality" but resting its holding on its finding that this construction "finds no support in the language of § 5"); cf. Nowak, *supra* note 1, at 1119 n. 114 (arguing that the Court in *Bossier Parish II* did not rule on the scope of Con-

The Court's recent decision in *Georgia v. Ashcroft*<sup>226</sup> may be similarly understood. At issue in the case was whether Georgia could permissibly replace some majority-minority districts with so-called "coalition" and "influence" districts.<sup>227</sup> In coalition districts, black voters need not comprise the majority of a district's population to be able to elect representatives of choice, while influence districts permit minority voters to exert some sway in the electoral process, but not necessarily elect representatives of choice.<sup>228</sup> The Court in *Georgia v. Ashcroft* was unanimous in holding that the VRA does not require that covered jurisdictions like Georgia mechanically retain majority-minority districts whenever possible within constitutional constraints. All nine justices agreed that section 5 instead allows use of coalition districts as an alternative.<sup>229</sup> A majority of the Court, moreover, held that the VRA permits covered jurisdictions to rely as well on influence districts to preserve minority voting strength.<sup>230</sup>

*Georgia v. Ashcroft* holds that covered jurisdictions have the discretion to select among these districting devices,<sup>231</sup> and that a jurisdiction's decision to replace majority-minority districts with a mixture of influence, coalition, and majority-minority districts need not be retrogressive.<sup>232</sup> The Court accordingly relies on a far more malleable conception of retrogression than it espoused in the *Bossier Parish* cases, which deemed the very rigidity of the retrogression to be among its primary virtues.<sup>233</sup> *Georgia v. Ashcroft* nevertheless follows the *Bossier Parish* decisions by continuing to circumscribe the discretion of the Justice Department within the preclearance process. *Georgia v. Ashcroft* cedes to covered jurisdictions discretion unprecedented within the preclearance process to shape their electoral districts, and thereby restricts the ability of the Justice Department to use the newly identified fluidity in the retrogression standard to manipulate districting decisions. That retrogression remains a meaningful curb on racial

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gress's power to enact legislation under the Fifteenth Amendment). See generally *infra* Part III.A.

226. 123 S. Ct. 2498 (2003).

227. See generally Pildes, *Is Voting Rights Law Now at War With Itself?*, *supra* note 206, at 1522 (defining and discussing coalition districts).

228. *Id.*

229. See *Georgia v. Ashcroft*, 123 S. Ct. at 2511-12; *id.* at 2518 (Souter, J., dissenting).

230. *Id.* at 2512-13.

231. See *id.* at 2511-13 (noting that, as between majority-minority and coalition districts, "[s]ection 5 does not dictate that a State must pick one of these methods of redistricting over another."); *id.* at 2513 ("Section 5 leaves room for States to use these types of influence and coalitional districts . . . . [T]he State's choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable.").

232. *Id.* at 2515 (suggesting that Georgia "likely met its burden of showing nonretrogression").

233. See *supra* notes 221-225 and accompanying text.

discrimination remains to be seen. What is clear is that the ability of the DOJ to demand fixed numbers of majority-minority districts is greatly diminished.

Finally, *Holder v. Hall*<sup>234</sup> and *Presley v. Etowah County Commission*,<sup>235</sup> appear to evince hostility to the VRA, but in fact rest on constructions of congressional intent that leave room for statutory amendments authorizing the proscriptions rejected in each case. At issue in *Holder* was the allegation that county governance by a single commissioner instead of by multiple commissioners elected from districts diluted the vote of the County's African-American community, and thereby had a racially discriminatory result within the meaning of section 2 of the VRA.<sup>236</sup> *Holder* holds section 2 inapplicable to the challenge, finding that "[t]here is no principled reason why one size should be picked over another as the benchmark for comparison."<sup>237</sup> *Presley* holds that laws altering the powers exercised by elected county commissioners are not changes "with respect to voting" within the meaning of section 5 of the VRA, and hence not changes for which preclearance is required.<sup>238</sup> *Presley* states that subjecting such changes to preclearance "would work an unconstrained expansion of [section 5's] coverage," and noted "appellants fail to give any workable standard to determine when preclearance is required."<sup>239</sup>

The Court could have held otherwise in both cases, at least on the facts presented. The law altering the commissioners' powers in *Presley* had been adopted following a voting-rights lawsuit that altered the structure of the commission and resulted in the election of an African-American commissioner.<sup>240</sup> The contested law, accordingly, appeared to resemble the type of law section 5 was meant to address.<sup>241</sup> In *Holder*, the

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234. 512 U.S. 874 (1994).

235. 502 U.S. 491 (1992).

236. *Holder*, 512 U.S. at 876-79 (noting African Americans constituted twenty percent of the county's population and that this community was sufficiently concentrated and cohesive to elect one representative to a five-person commission, if districts were drawn to allow black voters to do so).

237. *See id.* at 881 (plurality opinion of Kennedy, J.).

238. *See Presley*, 502 U.S. at 503-08 (construing VRA § 5, 42 U.S.C. § 1973c (requiring preclearance if a covered jurisdiction "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect" on designated dates)).

239. *Id.* at 504-05.

240. *Id.* at 522 n.23 and accompanying text; *see also* LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 179-80 (1994); Rubin, *supra* note 144, at 64 n.181; Robert Bryson Carter, Note, *Mere Voting: Presley v. Etowah County Commission and the Voting Rights Act of 1965*, 71 N.C. L. REV. 569, 593 (1993) (arguing that *Presley* engages in "hamstringing" that "frustrates the Act's congressional intent").

241. *See Beer v. United States*, 425 U.S. 130, 140 (1996) (stating that "Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck

predominant statewide practice of county governance by five-member commissions offered a potential benchmark against which to evaluate the County's reliance on a single commissioner to govern.<sup>242</sup> Instead, the Court adopted narrow readings of the VRA in each case and thereby departed from prior decisions expressing the Court's view that Congress intended for the VRA to be given "the broadest possible scope."<sup>243</sup> And yet, *Holder's* concern about the absence of a meaningful benchmark and *Presley's* wariness of the slippery slope reflect the Court's conviction that Congress had not intended the broad statutory construction proffered in each case. Both decisions hold only that Congress did not authorize the restructuring of local governance plaintiffs sought in each case; they do not hold that Congress could not require such restructuring.<sup>244</sup>

### III. BREACHING STATE AUTONOMY TO ASSURE STATE PRIMACY

The Rehnquist Court, like the Waite Court before it, appears to recognize distinct congressional power to address racial discrimination in the political process. It painstakingly preserved the VRA precedent in the *Boerne* cases<sup>245</sup> and affirmatively embraced sweeping congressional power in *Lopez*.<sup>246</sup> In developing the *Shaw* doctrine, it suggested that Congress possesses unique authority to require race-based decisionmaking,<sup>247</sup> and, even when it read the VRA narrowly, it preserved the possibility for the broad exercise of congressional power.<sup>248</sup> The

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down"); see also *Bossier Parish II*, *supra* note 30, 528 U.S. 320, 366 (2000) (Souter, J., concurring in part and dissenting in part) (stating that the "statute contains no reservation in favor of customary abridgment grown familiar after years of relentless discrimination, and the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles").

242. *Holder v. Hall*, 512 U.S. 874, 955 (1994) (Blackmun, J., dissenting) (arguing that five-person commission used widely throughout the State offered an appropriate benchmark); see also Lani Guinier, *The Supreme Court, 1993 Term — Foreword: [E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 114 (1994) (arguing that *Holder* "undermines Congress's decision to override local majorities whose election structures result in minority group exclusion"); Tucker, *supra* note 1, at 574 (arguing that *Holder* "substantially cut back on the 'broad construction' of the Voting Rights Act given by the Court in cases such as *Allen* and endorsed by Congress").

243. See, e.g., *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32 (1978); *Allen v. State Bd. of Elections*, 393 U.S. 544, 566-67 (1969).

244. Congress has previously enacted more expansive statutes in response to narrow judicial constructions of them. See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); Abner J. Mikva & Jeff Bleich, *When Congress Overrides the Court*, 79 CAL. L. REV. 729 (1991). That it will do so in connection with the VRA and specifically with section 5 when it expires in 2007 remains to be seen.

245. See *supra* notes 157-159 and accompanying text.

246. See *supra* notes 178-193 and accompanying text.

247. See *supra* notes 210-213 and accompanying text.

248. See *supra* note 244 and accompanying text.

Court has not, however, expressly explained why it seems to think that Congress enjoys special power to block racial discrimination in state political processes.

While several rationales may explain the Court's approach, this Part argues that it is best understood in functional terms. Like the Waite Court, the Rehnquist Court accepts the deep intrusion into state sovereignty that results from the exercise of congressional intervention to address racial discrimination in voting. It views such power as necessary to ensure state primacy over the protection of individual rights more generally.

### A. *Reasons for Deference: Text, History, and the Functional View*

The Fifteenth Amendment expressly addresses racial discrimination in voting. It provides that a citizen's right to vote "shall not be denied or abridged" based on race, and, in Section 2, cedes to Congress "power to enforce this article by appropriate legislation."<sup>249</sup> It thus ostensibly offers a textual basis to explain judicial deference to congressional power in this realm. *Reese* and *Cruikshank* suggest that Congress has more power to address private conduct under the Fifteenth Amendment than under the Fourteenth and thereby appear to distinguish congressional powers under the two Amendments.<sup>250</sup> *Lopez v. Monterey County* arguably suggests a similar distinction by invoking the Fifteenth Amendment alone as providing constitutional authority for the enactment of section 5 of the VRA.<sup>251</sup>

The language of Section 2 of the Fifteenth Amendment, however, parallels that of Section 5 of the Fourteenth Amendment,<sup>252</sup> and the modern Court has repeatedly insisted that congressional power under both sections is "coextensive."<sup>253</sup> Accordingly, whether deferential or

249. U.S. CONST. amend. XV.

250. See *supra* notes 93-104 and accompanying text.

251. See *Lopez v. Monterey County*, 525 U.S. 266, 269 (1999).

252. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

253. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001) (noting that the two enforcement clauses are "virtually identical"); *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (citing precedent addressing Congress's enforcement powers under the Fourteenth, Fifteenth, and Eighteenth Amendments without distinguishing among these grants of authority); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (noting similarity between Fourteenth and Fifteenth Amendments enforcement powers); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) ("The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States."); see also *Lopez*, 525 U.S. at 294 n.6 (Thomas, J., dissenting) ("Although *Boerne* involved the Fourteenth Amendment enforcement power, we have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as coextensive."); *City of Rome v. United States*, 446 U.S. 156, 208 n.1 (1980) (Rehnquist, J., dissenting) ("[T]he nature of the enforcement

rigorous, review of legislation enacted pursuant to either section should be based on the same standard. The Court, moreover, has expressly held that both Amendments protect voting rights,<sup>254</sup> and has deferred to congressional efforts to address racial discrimination in voting, regardless of the Amendment under which the Court understood Congress to have acted.<sup>255</sup> Constitutional text, standing alone, thus does not explain judicial deference to Congress in this realm.

The long history of racial discrimination in voting in the United States certainly informs the Court's deferential stance. Professors Dorf and Friedman point out that when Congress enacted the VRA in 1965, "it was entirely plausible" for the legislature to conclude that racial animus motivated voting rules having a disparate racial impact, even where specific proof of invidious intent was unavailable.<sup>256</sup> This plausible conclusion, in turn, permits judicial deference to federal legislation proscribing racially discriminatory effects in the voting realm, even absent detailed legislative findings linking intent and effect.<sup>257</sup> The *Boerne* decisions permit Congress to assume this linkage for voting-rights legislation enacted not just in 1965, but also in 1970 and 1975,<sup>258</sup> while *Lopez v. Monterey County* assumes the linkage for the 1982 Amendments to section 5, as applied in the 1990s.<sup>259</sup>

Still, history alone does not explain the Court's deferential approach. Racial discrimination in voting is not limited to the distant

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powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive."); *United States v. Guest*, 383 U.S. 745, 783-84 (1966) (Brennan, J., concurring) (noting that the language of both Amendments is virtually the same and that the courts should use the same standard to gauge the scope of congressional authority for both).

254. See, e.g., *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (holding the right to vote to be a fundamental right protected by Section 1 of the Fourteenth Amendment); *Reynolds v. Sims*, 377 U.S. 533 (1964) (locating within the Equal Protection Clause authority for the principle of one person, one vote in apportionment).

255. See, e.g., *Lopez*, 525 U.S. at 284-85 (upholding the constitutionality of § 5 of the VRA under the Fifteenth Amendment); *Boerne*, 521 U.S. at 518 (affirming validity of § 4(e) of the VRA as valid legislation under the Fourteenth Amendment); *Katzenbach v. Morgan*, 384 U.S. at 658 (upholding § 4(e) of the VRA (exclusively) under the Fourteenth Amendment).

256. Dorf & Friedman, *supra* note 128, at 91 n.126.

257. Compare *South Carolina v. Katzenbach*, 383 U.S. at 305-09 (noting the extensive findings supporting the VRA), with *Katzenbach v. Morgan*, 384 U.S. at 658 (upholding § 4(e) of the VRA, adopted by floor Amendment with no accompanying legislative findings); see also *Oregon v. Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring in part and dissenting in part) ("In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records.").

258. See *Boerne*, 521 U.S. at 518 (preserving VRA quartet); *City of Rome*, 446 U.S. at 159 (addressing the 1975 extension of § 5 of the VRA); *Mitchell*, 400 U.S. 112 (1970) (addressing the 1970 Amendments to the VRA).

259. See *Lopez*, 525 U.S. at 282-83 (upholding broad reading of § 5 of the VRA as extended in 1982); see also *supra* note 182 and accompanying text.

past,<sup>260</sup> but neither are other types of longstanding unconstitutional discrimination such as gender discrimination. The Court, however, routinely defers to congressional efforts to address racial discrimination in voting, but its treatment of congressional attempts to address gender discrimination is decidedly mixed. Whereas the Court in *Nevada Department of Human Resources v. Hibbs* upheld the FMLA as an effort to protect against unconstitutional gender discrimination, the Court in *United States v. Morrison* did not find the long and continuing history of gender discrimination in state criminal-justice systems sufficient to defer to Congress's assessment of the magnitude of the constitutional injury or to its selection of the appropriate remedy.<sup>261</sup> Historical and persistent discrimination is accordingly not sufficient to trigger the Court's deference.

Congressional efforts to address racial discrimination outside the voting context likewise consistently fail to elicit judicial deference. To be sure, blocking discrimination based on race is at the core of the Reconstruction-era Amendments. Described by the *Slaughter-House Cases* as their "one pervading purpose,"<sup>262</sup> this aim arguably suggests a two-tiered approach in which Congress enjoys greater power to block racial discrimination under these Amendments than it does to regulate other types of conduct.<sup>263</sup> A generation ago, Justice Black espoused this view, stating that "[w]here Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments."<sup>264</sup> The *Boerne* decisions support this approach insofar as they invalidate statutes, including some seemingly traditional civil-rights measures, which did not address racial discrimination, while preserving the VRA precedent, which did.<sup>265</sup> Still,

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260. See, e.g., *Bossier Parish II*, *supra* note 30, 528 U.S. 320, 347-49 (2000) (Souter, J., concurring in part and dissenting in part) (citing stipulated facts indicating resistance among white school-board members to the election of a black school-board member).

261. *United States v. Morrison*, 529 U.S. 598, 615, 625-26 (2000); *id.* at 630-31 n.7 (Souter, J., dissenting) (citing Gender Bias Task Force reports that Congress considered); *id.* at 666 (Breyer, J., dissenting) (citing congressional reports documenting unconstitutional gender bias in state-court systems); see also *supra* notes 121 and 133 and accompanying text.

262. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873) (describing the aim of the new Amendments to be "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him").

263. *STONE ET AL.*, *supra* note 63, at 434 (noting that *Slaughter-House* can be read to suggest such a two-tiered approach, with the Fourteenth Amendment read expansively to provide comprehensive federal protection of the newly freed slaves, but otherwise leaving "state resident's primary recourse for protection of rights [] to his own state government").

264. *Oregon v. Mitchell*, 400 U.S. 112, 129 (1970) (opinion of Black, J.); see also *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966); *Baker v. Carr*, 369 U.S. 186, 285-86 (1962) (Frankfurter, J., dissenting) (noting that "[a]n end of discrimination against the Negro was the compelling motive of the Civil War Amendments").

265. See *supra* Part II.A.

decisions by both the Rehnquist and Waite Courts refuse to accord special deference to Congress's efforts to address racial discrimination not directly implicating the political process. The *Civil Rights Cases* strike down Congress's effort to reach private racial discrimination in public accommodations while *United States v. Harris* invalidates similar efforts to block privately orchestrated, racially motivated assaults.<sup>266</sup> So too, *Adarand Constructors, Inc. v. Peña*<sup>267</sup> holds that race-based classifications authorized by Congress are subject to the same strict scrutiny *City of Richmond v. J.A. Croson Co.*<sup>268</sup> applies to race-based decisionmaking by state and local actors.<sup>269</sup> Congressional efforts to grapple with racial discrimination do not, alone, trigger judicial deference.

Congressional authority to address racial discrimination in voting appears relatively circumscribed when compared with its power to protect a host of property and liberty interests under the Fourteenth Amendment. While in fact potentially quite broad,<sup>270</sup> the power to address racial discrimination in voting still seems unlikely to devolve into a plenary power.<sup>271</sup> The Court could accordingly view deference to Congress here as less damaging to federalism values than is deference to other types of enforcement legislation.<sup>272</sup> To be sure, to the

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266. See *The Civil Rights Cases*, 109 U.S. 12 (1883) (invalidating ban on racial discrimination in public accommodations found in the Civil Rights Act of 1875); *United States v. Harris*, 106 U.S. 629 (1883) (invalidating a federal antilynching statute meant to address widespread, unremediated violence against black southerners, applicable regardless of state dereliction of the guardianship role).

267. 515 U.S. 200 (1995) (holding strict scrutiny applicable to a federal statute that presumed African Americans and other racial minorities to be "disadvantaged" and thus eligible for federal affirmative-action contracting program).

268. 488 U.S. 469 (1989).

269. *Adarand* potentially leaves room for judicial deference to congressional judgments regarding the need to rely on race in a decisionmaking process, but the Court has yet to so hold. See *Adarand*, 534 U.S. 103 (2001) (dismissing case as improvidently granted).

270. See *infra* notes 369-370 and accompanying text.

271. Cf. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, *supra* note 20, at 1190-91 (noting that "[t]he ends authorized by this Section 2 [of the Fifteenth Amendment] are far more constrained than those authorized by Section 5 . . . the latter touch upon a wide a variety of liberty and property interests in a wide variety of contexts," and arguing that deferential review of § 2 legislation would not "functionally award Congress a virtually plenary police power"); Dorf & Friedman, *supra* note 128, at 91 n.126 (evaluating whether the "narrower subject matter" of the Fifteenth Amendment means that the Court can "afford" to accord Congress greater deference).

272. Professors Dorf and Friedman suggest, but ultimately reject, this explanation for the Court's approach to voting cases. Because Congress's enforcement power under the Thirteenth Amendment could become plenary, they argue that "the difference in wording and subject matter among the Thirteenth, Fourteenth, and Fifteenth Amendments does not justify the narrower approach that the Court has lately taken toward the Fourteenth." See Dorf & Friedman, *supra* note 128, at 91 n.126. This conclusion depends on how the Court will address congressional power under the Thirteenth Amendment in the post-*Boerne* world, something it has yet to do. Cf. *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002),



extent that congressional power here is not tethered exclusively to the Fifteenth Amendment,<sup>273</sup> it is not necessarily more circumscribed than Congress's power to remedy age discrimination in state employment or gender bias in the criminal-justice system, problems over which the Court has accorded Congress little deference when structuring enforcement measures.<sup>274</sup>

The bounded character of Congress's power to block racial discrimination in voting may nevertheless help explain judicial deference to congressional efforts to address racial discrimination in voting. The congressional power may be seen as bounded insofar as its exercise renders more extensive federal legislation unnecessary. As Professor Issacharoff explains, "process-based claims can relieve a conservative judiciary of any obligation to police substantive distributional outcomes of the policy decisions of elected political bodies."<sup>275</sup>

Judicial deference to Congress in this realm reflects the assumption that individual liberty is best protected at the state and local level,<sup>276</sup> but only so long as state and local governments are democratically accountable.<sup>277</sup> The next two Sections attempt to establish that this assumption about state power and democratic representation underlies decisions by both the Waite and Rehnquist Courts.

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*cert. denied*, 537 U.S. 835 (2002) (upholding 18 U.S.C. § 245(b)(2)(B) under the Thirteenth Amendment).

273. See *supra* notes 252-255 and accompanying text.

274. See *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

275. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1869 (1992); see also Karlan, *Easing the Spring*, *supra* note 166, at 1591:

Regulation of the political process represents a decision to combat the risk of unconstitutional discrimination on the wholesale level, by providing all citizens with an equal opportunity to participate effectively in the political process, rather than leaving all enforcement to the retail level by enacting laws that impose equal-treatment obligations in indiscrete areas of state-government activity such as schools, public employment, or housing.

276. See, e.g., Nelson Lund, *Federalism and Civil Liberties*, 45 U. KAN. L. REV. 1045 (1997); see also David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 491 (1999) (arguing that local governments "are often uniquely well positioned to give content to the substantive constitutional principles . . . better positioned in some instances, that is, than either federal or state institutions"); cf. BRAEMAN, *supra* note 57, at 59 (noting post-Civil War Republican "hope . . . that the southern states would do the job of protecting all their citizens' rights").

277. See, e.g., *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 628 (1969) ("The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on the assumption that the institutions of state government are structured so as to represent fairly all the people."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1880) (describing the right to vote as the "preservative of all rights").

### B. Reinforcing Representation in the Waite Court

Sixty years before Justice Stone's famous footnote four,<sup>278</sup> the Waite Court understood that racial discrimination inhering in the political process may prevent state governments from adequately protecting individual rights. *Ex parte Yarbrough*<sup>279</sup> sustains Congress's power to block privately orchestrated, racially motivated violence affecting congressional elections. The decision is typically read to uphold virtually plenary congressional power to regulate federal elections, but to offer no support for analogous authority over state and local elections.<sup>280</sup>

*Yarbrough*, however, posits a functional understanding of congressional power that suggests Congress also enjoys considerable authority to protect the integrity of nonfederal elections. *Yarbrough* assumes nontextual authority for Congress's power to regulate federal elec-

278. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (noting that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities").

279. 110 U.S. 651 (1884). *Yarbrough* sustained convictions obtained based on indictments charging a private conspiracy to "intimidate" a black man, "on account of his race," "in the exercise of his right to vote for a member of congress," even though the underlying statutory provision blocked such intimidation without regard to racial motivation. *Id.* at 657.

280. See, e.g., FAIRMAN, *supra* note 42, at 490 (stating that *Yarbrough* avoided the state-action constraints of the Fourteenth and Fifteenth Amendments "by determining that the right of a qualified voter to cast his ballot in a federal election was based on Article I, and the power of Congress to protect it did not depend on the post-Civil War Amendments"); Charles A. Kent, *Constitutional Development in the United States, as Influenced by the Decisions of the Supreme Court Since 1865*, in CONSTITUTIONAL HISTORY OF THE UNITED STATES AS SEEN IN THE DEVELOPMENT OF AMERICAN LAW: A COURSE OF LECTURES BEFORE THE POLITICAL SCIENCE ASSOCIATION OF THE UNIVERSITY OF MICHIGAN 201, 226 (1889) (reading *Yarbrough* to be exclusively about federal elections); Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 62 n.42 (2001) (citing *Yarbrough* as precedent upholding congressional power under Article I, Section 4, to regulate individual action interfering with the right to vote in federal elections); Lawsky, *supra* note 96, at 806 n.142 (*Yarbrough* addresses the right to vote in congressional elections); Nowak, *supra* note 1, at 1107 & nn.54-55 (same); Michael S. Steinberg, Note, *A Critique of the Current Method of Scheduling Primary Elections and a Discussion of Potential Judicial Challenges*, 69 GEO. WASH. L. REV. 453, 462 (2001) (citing *Yarbrough* as authority for "Congress's unique ability, indeed responsibility, to regulate the fair conduct of federal elections"); cf. CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890, at 308 (1939) (discussing *Yarbrough* and stating that based on Article I, Section 4 "and from other provisions, a power is deduced to insure free and pure elections").

Historians dispute the significance of *Yarbrough* insofar as the decision is limited to federal elections. Compare Maltz, *supra* note 36, at 85 (noting that even if *Yarbrough* reached no further than federal elections, it offered Congress "substantial power" to block private efforts to prevent African Americans from voting; those seeking to interfere with registration would not distinguish federal from state elections, and many state and federal elections were held at the same time), with BRAEMAN, *supra* note 57, at 66 & 152 n.42 (reading *Yarbrough* as limited to congressional elections, and arguing that congressional power in this regard was inadequate given that "state and local elections were where the officeholders most directly affecting people's lives were chosen").

tions. Article I, Section IV permits Congress to regulate congressional elections, but says nothing about presidential elections.<sup>281</sup> *Yarborough* nevertheless insists that “[i]t is essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people.”<sup>282</sup> It deems critical congressional power to ensure that both the federal executive and legislative branches represent “the free choice of the people,”<sup>283</sup> notwithstanding the absence of textual support for this broad power.

When *Yarborough* was decided, moreover, the Court’s concern for the representative quality of the federal legislature would have provided the basis for congressional power to reach state elections. At that time, state legislatures still selected United States Senators. Accordingly, the capacity of the U.S. Senate to represent “the free choice of the people” rested exclusively on the representative quality of the state legislatures selecting Senators.<sup>284</sup> To be effective, congressional power to protect the representative character of the Senate seemingly needed to encompass regulatory power over state legislative elections as well.<sup>285</sup>

Most significant, however, is *Yarborough*’s discussion of the Fourteenth Amendment. The *Yarborough* petitioners relied on Fourteenth Amendment precedent restricting Congress’s ability to reach private

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281. U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

282. *Yarborough*, 110 U.S. at 666.

283. *Id.*; see *id.* at 657 (noting that the government’s “executive head and legislative body” are both elective and speaking of the federal government’s “power to protect the elections on which its existence depends from violence and corruption”); see also Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 887-88 (2002) (arguing that *Yarborough* “planted the seed” for recognizing congressional power to regulate the processes for the selection of presidential electors); James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 984 (1997) (citing *Yarborough* and stating that “the Court held that Congress has the power to regulate presidential elections because it must — because such a power must exist in a republic”); Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 33 (1968) (noting that “[w]hile the indictment in [*Yarborough*] involved only a congressional election and was based on intimidation of Negro voters — undoubtedly a special case under the fifteenth amendment — the reasoning of the Court went much further”); Steinberg, *supra* note 280, at 461-62 (arguing that *Yarborough*’s reasoning does not distinguish between congressional and presidential elections).

284. U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . .” (amending Art. I, Section 3, which provided that “the Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof”)).

285. *Yarborough*, 110 U.S. at 658, 666 (noting that Congress “must have the power to protect the elections on which its existence depends from violence and corruption” and that it needs such authority to retain its legitimacy as “the free choice of the people,” a condition that is “essential to the successful working of this government”).

action to support their claim that Congress could not block privately initiated assaults on black voters.<sup>286</sup> This reliance on the Fourteenth Amendment precedent seems misplaced. The assault at issue in *Yarbrough* occurred during a congressional election. Article I, Section IV provides Congress ample authority to regulate such elections,<sup>287</sup> and thus any strictures on congressional action taken pursuant to the Fourteenth Amendment simply did not pertain. The assault, moreover, occurred because the victim had exercised his right to vote. Prior to *Yarbrough*, the Fourteenth Amendment was generally not thought to protect the quintessentially "political" right to vote.<sup>288</sup> Accordingly, the Fourteenth Amendment's proscription on state action and any limitation on congressional action that might follow from it ostensibly had no bearing on the question of congressional power to bar privately initiated assaults on voters in congressional elections.<sup>289</sup>

Justice Miller's opinion for the Court in *Yarbrough* dismisses the defendants' reliance on the Fourteenth Amendment precedent. But it ignores both of these readily available grounds for doing so. *Yarbrough* elsewhere recognizes distinct federal power to regulate and protect federal elections,<sup>290</sup> but makes no mention of this authority as a reason to reject the defendants' Fourteenth Amendment claims. And while the "political" nature of the right to vote might similarly have offered grounds to distinguish Fourteenth Amendment precedent,

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286. *Id.* at 665-66; see also Brief for Petitioners at 11, *Ex Parte Yarbrough*, 110 U.S. 651 (1884) (No. 75) (arguing that the Court had never "held that Congress has the power to prescribe penalties, or to interfere with the sovereignty of the States, except to prevent the States, or their officers and agents, from overriding or disregarding the restrictions imposed upon the States themselves" by the new Amendments).

287. See *supra* note 280.

288. On the distinctions among civil, political, and social rights during Reconstruction, compare AKHIL REED AMAR, *THE BILL OF RIGHTS* 216-18 n. \* (1998); and HYMAN & WIECEK, *supra* note 36, at 395-97; and EARL MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS 1863-1869*, at 118-20 (1990); and WILLIAM NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988); and Roderick M. Hills, *Back to the Future? How the Bill of Rights Might Be About Structure After All*, 93 NW. U. L. REV. 977, 993-94 & n.60 (1999) (reviewing AMAR, *supra*); with RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 153-76 (1999) (describing the fluidity with which the terms civil, political, and social rights were used during Reconstruction); and Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1120 (1997) (noting that "[d]istinctions among civil, political, and social rights functioned more as a framework for debate than a conceptual scheme of any legal precision").

289. A century after ratification of the Fourteenth Amendment, the Supreme Court held the protection of voting rights to be within the ambit of the Fourteenth Amendment. See, e.g., *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964); see also Hills, *supra* note 288, at 994-95 (describing these decisions as a "direct repudiation of the fundamental assumptions underlying the Fourteenth Amendment").

290. See *Yarbrough*, 110 U.S. at 658, 666 (noting that Congress "must have the power to protect the elections on which its existence depends from violence and corruption" and that it needs such authority to retain its legitimacy as "the free choice of the people," a condition that is "essential to the successful working of this government").

Justice Miller's opinion instead suggests that this right is within the Amendment's ambit. Nearly a century before the Court expressly recognized the Fourteenth Amendment to protect voting rights,<sup>291</sup> *Yarbrough* states that "while it may be true that acts which are mere invasions of private rights" are, absent state action, "not within the scope" of the Fourteenth Amendment, "it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of government itself."<sup>292</sup>

According to the Court's opinion in *Yarbrough*, the defendants' reliance on Fourteenth Amendment precedent was misplaced because the types of rights at issue in cases like the *Civil Rights Cases* and *United States v. Harris* are distinct from the one at issue in *Yarbrough*. The opinion implicitly categorizes the rights to nondiscriminatory use of public accommodations and to freedom from racially motivated assaults as "private rights" over which the states retain the primary authority and responsibility to protect.<sup>293</sup> Precedent addressing such rights afforded the defendants "no aid in the present case,"<sup>294</sup> because a black voter's right to participate in the political process free of racial discrimination is seen to constitute a constitutionally protected right "essential to the healthy organization of government itself."<sup>295</sup>

*Yarbrough* accordingly posits the view that the Fourteenth Amendment protects a hierarchy of rights. Regardless of the constraints that limit congressional power to reach private action in other realms, "it is quite a different matter" when Congress acts to protect these essential ones. *Yarbrough* suggests that Congress may prohibit private assaults on black voters in federal and state elections alike,<sup>296</sup> because, absent such authority, "the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint."<sup>297</sup>

Justice Miller's opinion is not concerned with identifying a textual source for this congressional power, noting that "it is a waste of time

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291. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1961).

292. *Yarbrough*, 110 U.S. at 666.

293. See Maltz, *supra* note 36, at 86 (arguing that *Yarbrough* and *Cruikshank* "posit a set of preexisting rights whose protection is remitted to the state governments").

294. *Yarbrough*, 110 U.S. at 666.

295. *Id.*

296. The basis upon which *Yarbrough* rejected the defendants' reliance on the Fourteenth Amendment precedent indicates the Court did not think this congressional power was limited to federal elections.

297. *Yarbrough*, 110 U.S. at 667. Justice Miller's general reference to the "sources of power," as opposed to a more specific reference to the sources of congressional power or even federal power, supports reading *Yarbrough* as recognizing congressional authority to protect state and federal elections from racial discrimination.

to seek specific sources of power to pass these laws.”<sup>298</sup> The opinion is more interested in identifying the necessity of this federal power in functional terms. Whatever the difficulties that may follow from “invasions of private rights,” racial discrimination affecting voting rights is understood to work a distinct harm and to require a distinct remedy. According to *Yarborough*, such discrimination interferes with the “healthy organization of government” and thereby renders states ill-equipped to protect individual rights and govern properly.

*Yarborough* does not question *Cruikshank*’s assertion that the “duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it remains there.”<sup>299</sup> By 1884, however, the Court recognized that performance of this state function depended on the “healthy organization of government.” Congress needed broad power to create the state and federal institutions necessary for healthy representative governance within the federal system. The hope is that this power to reinforce representation at the local level will render unnecessary massive federal intervention supplanting state primacy in the protection of individual liberty.

In this sense, *Yarborough* builds on the Waite Court’s decision four years earlier in *Strauder v. West Virginia*.<sup>300</sup> *Strauder* holds that a state law blocking blacks from jury service violates the Equal Protection Clause. Justice Strong’s opinion for the Court suggests that the West Virginia statute might function to deny black defendants impartial treatment within the criminal-justice system.<sup>301</sup> So understood, the law represents a straightforward violation of the Fourteenth Amendment.<sup>302</sup> The Court, however, also appears to identify an equal protec-

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298. *Id.* at 666.

299. *United States v. Cruikshank*, 92 U.S. 542 (1876); see *United States v. Cruikshank*, 25 F. Cas. 707, 710 (C.C.D. La. 1874) (No. 14, 899) (opinion of Bradley, J.) (“The affirmative enforcement of the rights and privileges themselves, unless something more is expressed, does not devolve upon [the United States], but belongs to the state government as a part of its residuary sovereignty.”); see also *STONE ET AL.*, *supra* note 63, at 435 (arguing that the Court’s reading of the Equal Protection Clause in the *Civil Rights Cases* “grew out of the same view of the states as the primary protector of individual rights that the Court expressed in *Slaughter-House*”); *BRAEMAN*, *supra* note 57, at 65 (stating that *Cruikshank* held that the Fourteenth Amendment had not “taken from the states primary responsibility for the protection of basic individual rights”); Kennedy, *supra* note 36, at 102 (noting that “the Waite Court sought to protect blacks within the framework of constitutional modifications that preserved a state-centered nationalism”).

300. 100 U.S. 303 (1879).

301. *Strauder*, 100 U.S. at 309 (noting that “prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy”); see also *AMAR*, *supra* note 288, at 272 & n.162; Hills, *supra* note 288, at 998-99.

302. See *MALTZ*, *supra* note 288, at 103-04 (noting view that the Equal Protection Clause “requires that the states make available on equal terms the mechanism necessary to enforce the rights created either by other provisions of the Constitution or by state law”);

tion injury suffered not by Strauder, but by the potential black jurors the state law excluded from jury service. Justice Strong's opinion states that West Virginia's express exclusion of blacks from the jury denied them "the privilege of participating equally . . . in the administration of justice" and "all right to participate in the administration of the law, as jurors."<sup>303</sup> The exclusion operated expressively as "practically a brand upon them, affixed by the law, an assertion of their inferiority." It worked functionally as "a stimulant to that race prejudice which is an impediment to securing individuals of the race that equal justice which the law aims to secure to all others."<sup>304</sup>

Prior to *Strauder*, the Fourteenth Amendment was not generally thought to guarantee black men the right to sit on juries.<sup>305</sup> *Strauder* nevertheless holds that the Amendment provides this guarantee. The decision recognizes what Professor Hills calls the "tight unity" between defendant Strauder's right to an impartial trial and the participatory rights of potential black jurors.<sup>306</sup> Justice Strong's opinion, Professor Hills explains, upholds the rights of these excluded jurors in order to protect Strauder's right to a fair trial. Since reviewing every jury verdict for impermissible racial discrimination is neither feasible nor desirable, *Strauder* seeks "to create the institutions necessary for the vindication of private rights."<sup>307</sup>

*Yarbrough*, like *Strauder*, suggests that racial discrimination affecting state political institutions precludes States from adequately protecting individual rights. Institution building at the state level was essential to vindicate the rights guaranteed by the new Amendments while still preserving the federal structure. Events at the time demonstrated that "private rights" would not be protected absent political institutions dedicated to their defense.<sup>308</sup> *Strauder* shows the Waite

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Hills, *supra* note 288, at 997 ("[I]mpartiality in criminal trials is the quintessential civil right guaranteed by the Fourteenth Amendment.").

303. *Strauder*, 100 U.S. at 308.

304. *Id.*

305. See, e.g., *Ex parte Virginia*, 100 U.S. 339, 369 (1879) (Field, J., dissenting); see also AMAR, *supra* note 288, at 273-74; PRIMUS, *supra* note 288; Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995); Hills, *supra* note 288; Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1014-23 (1995); Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1349-50 (1996); Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884, 886-90 (1987).

306. Hills, *supra* note 288, at 999; see also AMAR, *supra* note 288, at 272 (noting that *Strauder* "straddled the question of whose rights this scheme violated").

307. Hills, *supra* note 288, at 997; *id.* at 1000 ("[J]udicial regulation of the structure of juries seems like the only way in which a court can vindicate the civil rights that the [Fourteenth Amendment's] framers unquestionably wished to protect.").

308. Hills, *supra* note 288, at 980, 1001 (stating that "private rights divorced from governmental structures were futile 'parchment barriers.' In order to be effective, rights must be

Court's willingness to mandate institutional change through direct constitutional interpretation. *Yarbrough* agrees that such institutions needed to be established, but does not itself reform the state institution. Instead, *Yarbrough* welcomes congressional participation in the endeavor.

### C. Reinforcing Representation in the Rehnquist Court

*City of Boerne v. Flores* rejects *Katzenbach v. Morgan*'s suggestion that Congress may enact legislation that "expands" Fourteenth Amendment rights.<sup>309</sup> It is careful, however, to affirm two related rationales for *Morgan*'s holding. One recognizes congressional power to ban New York's English literacy test as a remedial measure for discrimination in establishing voter qualifications.<sup>310</sup> The other, of more relevance here, upholds congressional power to ban the test as a mechanism to address discrimination in public services. *Morgan* states that the congressional ban offered New York's Puerto Rican community "enhanced political power [that] will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community."<sup>311</sup> Articulating what Professor Karlan has labeled the "prospective model of constitutionally corrigible invidious discrimination,"<sup>312</sup> *Morgan* upholds section 4(e) of the VRA because it "enables the Puerto Rican minority better to obtain 'perfect equality of civil rights and the equal protection of the laws.'"<sup>313</sup> *Boerne* affirms the validity of this rationale, stating that the exercise of congressional power "rested on unconstitutional discrimination in New York."<sup>314</sup>

That this "unconstitutional discrimination" had in fact occurred was essential neither to the Court in *Morgan* nor, notably, to the Rehnquist Court in *Boerne*. *Morgan* and *Boerne* cite no evidence suggesting that such discrimination had taken place and require no specific congressional findings corroborating speculation about such discrimination. Instead, *Morgan* invokes the extreme deference to Congress for which the decision is remembered, finding it sufficient that Congress could have found that such discrimination exists. *Morgan* insists that "[i]t is enough that we be able to perceive a basis

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embedding in a network of political institutions — juries, legislatures, constitutional conventions, etc. — that help to define and enforce those rights" (footnote omitted)).

309. See *supra* notes 126-127 and accompanying text.

310. *City of Boerne v. Flores*, 521 U.S. 507, 528 (1997); *Katzenbach v. Morgan*, 384 U.S. 641, 654 (1966).

311. *Katzenbach v. Morgan*, 384 U.S. at 652.

312. See Karlan, *Two Section Twos and Two Section Fives*, *supra* note 136, at 729.

313. *Katzenbach v. Morgan*, 384 U.S. at 653 (quoting *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)).

314. *Boerne*, 521 U.S. at 528.



upon which the Congress might resolve the conflict as it did.”<sup>315</sup> So too, *Boerne* is apparently satisfied with the unsubstantiated assertion that section 4(e)’s effort to avert prospective discrimination “rested on unconstitutional discrimination in New York.”<sup>316</sup>

Even so, *Boerne* and its progeny hardly embrace the deferential stance *Morgan* employs. *Morgan* refuses to assess whether eliminating New York’s literacy test is an effective means to address invidious discrimination in public services. *Morgan* states that only Congress can make such determinations.<sup>317</sup> The *Boerne* decisions, however, establish that Congress does not have such unbounded discretion to craft remedies.<sup>318</sup> Under *Boerne* and its progeny, Congress may not diminish the prospect of invidious discrimination in public services by, for example, abrogating New York’s immunity from private suits alleging such discrimination. The *Boerne* cases bar Congress from creating such a regime, at least insofar as it acts in the absence of concrete and substantial evidence documenting such discrimination.<sup>319</sup>

The Rehnquist Court nevertheless expressly affirms *Morgan*’s embrace of congressional power to regulate state political processes as a means to diminish the prospect that invidious discrimination might occur. While *Morgan* suggests virtually complete congressional discretion to select among a host of remedies, section 4(e) of the VRA looks good to the Court in *Boerne* because Congress selected precisely the remedy that it did. Section 4(e), *Boerne* explains, is a vehicle “to give Puerto Ricans ‘enhanced political power’ that would be ‘helpful in gaining nondiscriminatory treatment in public services.’”<sup>320</sup> *Boerne* sees section 4(e) as an effort to fix the state’s political processes in order to facilitate more responsive governance by the state itself. The statute is entitled to deferential judicial review because it is structured to maintain state primacy in the protection of individual rights. *Boerne* thus asserts that the Fourteenth Amendment’s Framers refused to “giv[e] Congress primary responsibility for enforcing legal equality,”<sup>321</sup>

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315. *Katzenbach v. Morgan*, 384 U.S. at 653.

316. *Boerne*, 521 U.S. at 528.

317. *Katzenbach v. Morgan*, 384 U.S. at 653 (stating that “[i]t was for Congress . . . to assess and weigh the various conflicting considerations” including “the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil” and noting “[i]t is not for us to review the congressional resolution of these factors”).

318. See *supra* note 128 and accompanying text.

319. See *supra* notes 129-135 and accompanying text.

320. *Boerne*, 521 U.S. at 528 (quoting *Katzenbach v. Morgan*, 384 U.S. at 652).

321. See *id.* at 521. For an argument that the Second Reconstruction achieves such primacy, see Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1501 (1987) (arguing that “[a]fter *Brown v. Board of Education* and the various civil rights acts, after the revolution in criminal procedure fostered by federal law and federal courts, after the imposition of uniform federal standards for basic liberties under the Bill of Rights, and after the proliferation of novel statutory ‘rights’ arising from the interven-

while its preservation of *Morgan* suggests a willingness to defer to congressional judgments regarding the measures and institutions thought necessary to facilitate state fulfillment of this responsibility.

The Court, of course, need not rely on Congress to reform state political institutions when a perceived defect in the political process threatens to prevent a state from adequately protecting individuals from discriminatory treatment. *Bush v. Gore*<sup>322</sup> is but the latest in a series of the Court's decisions that dramatically restructure the processes of state governance based on newly derived constitutional mandates.<sup>323</sup> To be sure, absent longstanding precedent and established practice, the Rehnquist Court might have agreed with Justices Frankfurter and Harlan that the Court should not enter the "political thicket" for fear of undermining the Court's moral authority,<sup>324</sup> and decide cases based on political philosophy rather than law.<sup>325</sup> The door, however, was already open and the Rehnquist Court made no attempt to close it.<sup>326</sup> Indeed, it has extended the foray into the thicket by articulating new ways in which the Constitution mandates particular political structures at the state level.<sup>327</sup> As Professor Pildes recently

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tions of the welfare-regulatory state, it is the federal government, not the states, that appears to be our system's primary protector of individual liberties").

322. 513 U.S. 98 (2000).

323. See, e.g., Jeffrey L. Fisher, *The Unwelcome Judicial Obligation to Respect Politics in Racial Gerrymandering Remedies*, 95 MICH. L. REV. 1404, 1428-29 (1997) (arguing that when lower federal courts craft remedies under *Shaw* and its progeny, they "subordinate states' political concerns to other, more sterile, redistricting criteria."); Katz, *Federalism, Preclearance, and the Rehnquist Court*, *supra* note 144, at 1201-02 (citing *Shaw v. Reno* in arguing that the Rehnquist Court long demonstrates a commitment to a "dramatic restructuring of state governance"); Lowenstein, *supra* note 144, at 785, 786 (noting paradox in *Shaw v. Reno* and its progeny that "conservative judges extend the Equal Protection Clause . . . beyond the reach of precedent to significantly displace state control over legislative districting" and that these decisions "offend conservative conceptions of federalism.").

324. *Baker v. Carr*, 369 U.S. 186, 266-67 (1962) (Frankfurter J., dissenting) ("The Court's authority . . . ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.").

325. See, e.g., *Allen v. State Bd. of Elections*, 393 U.S. 544, 586 (1969) (Harlan, J., concurring in part and dissenting in part) (arguing that the Court was ill-equipped to decide whether a multimember system was more "effective" to minority interests than single-member districts: "[u]nder one system, Negroes have some influence in the election of all officers; under the other, minority groups have more influence in the selection of fewer officers"); *Reynolds v. Sims*, 377 U.S. 533 (1964) (Harlan, J., dissenting).

326. See, e.g., *Bd. of Estimate v. Morris*, 489 U.S. 688 (1989) (striking down New York City's governing Board of Estimate as a violation of the Equal Protection Clause); see also *Bossier Parish II*, *supra* note 30, 528 U.S. 320 (2000).

327. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (state judicial canon barring candidates in judicial elections from announcing their views on disputed legal issues violates the First Amendment); *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (striking down the "blanket" primary as a violation of the First Amendment); *Bush v. Gore*, 531 U.S. 98 (2000) (absence of uniform standards for assessing the voter intent on recounted ballots violates the Equal Protection Clause); cf. *Arkansas Educ. Television*

observed, the Court “now routinely deploys constitutional law to circumscribe the forms democracy can take . . . [and] almost reflexively acts as if it were appropriate for constitutional law always to provide ready answers as to what makes democracy ‘best.’ ”<sup>328</sup>

Decisions such as *Bush v. Gore* and *California Democratic Party v. Jones*<sup>329</sup> display the Court’s confidence in its institutional capacity to identify constitutional rules governing democratic participation. *Bush v. Gore* reads the Equal Protection Clause to mandate consistent standards for assessing voter intent on disputed ballots.<sup>330</sup> *California Democratic Party* holds that the First and Fourteenth Amendments prohibit a state-mandated blanket primary, a practice that permits voters to vote, office by office, for any candidate on the ballot, regardless of the voter’s or candidate’s party affiliation.<sup>331</sup> These decisions necessarily limit congressional power to regulate state and local political processes pursuant to Section 5 of the Fourteenth Amendment.<sup>332</sup> After *Bush v. Gore*, for example, Congress could not mandate that different standards govern the counting of dangling chads from disputed ballots in different jurisdictions, just as it is precluded from mandating unequal apportionment among electoral districts.<sup>333</sup> So too, after *California Democratic Party*, Congress may neither authorize nor mandate a blanket primary.

Even so, the decisions do not entirely foreclose congressional action. *Bush v. Gore* appears to leave open the possibility that

Comm’n v. Forbes, 523 U.S. 666 (1998) (First Amendment does not bar exclusion of third-party candidate from televised debate); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

328. Richard H. Pildes, *Constitutionalizing Democratic Politics*, in *A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* 156 (Ronald Dworkin ed., 2002) [hereinafter Pildes, *Constitutionalizing Democratic Politics*].

329. 530 U.S. 567 (2000).

330. *Bush v. Gore*, 531 U.S. 98, 105-06 (2000) (per curiam) (“The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.”).

331. *California Democratic Party*, 530 U.S. at 581-82, 585-86.

332. Article I, section 4 permits Congress to regulate federal elections without regard to the constraints of section 5 of the Fourteenth Amendment. See U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

333. See *Reynolds v. Sims*, 377 U.S. 533, 577-81 (1964):

By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.

*Id.*; *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (holding that Article I, section 2 “means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”).

Congress could mandate specific technology or a uniform federal standard to govern the recounts of disputed ballots. Such measures could arguably be deemed to enforce the right to equal treatment articulated in *Bush v. Gore*, and thus to satisfy *Boerne's* congruent and proportional standard.<sup>334</sup> So too, *California Democratic Party* would seemingly allow Congress to prohibit the open primary, a practice that resembles the blanket primary except for the fact that it requires voters to select among the candidates from only one party in any given primary election.<sup>335</sup> While *California Democratic Party* expressly declined to address the constitutionality of the open primary,<sup>336</sup> the similarity between the blanket primary and the open primary suggests that Congress could bar the latter practice as a prophylactic measure to enforce the associational rights of political parties.<sup>337</sup>

These decisions stand in curious relation to *Shaw v. Reno* and its progeny. Like *Bush v. Gore* and *California Democratic Party*, the *Shaw* decisions read the Constitution to set forth a rule structuring democratic governance. They locate within the Equal Protection

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334. Cf. Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons From the Past and Reforms For the Future*, 43 WM. & MARY L. REV. 851, 881-87 (2002) ("[T]he Court's recent equal protection ruling in *Bush v. Gore* expands the range of potential Section 5 legislation in the presidential-election area[.]" while concluding that *Boerne* will preclude many of these efforts); Paul M. Schwartz, *Voting Technology and Democracy*, 77 N.Y.U. L. REV. 625, 683-89 & nn.307, 325 (2002) (citing a House Resolution and a report by the independent National Commission on Electoral Reform each of which would require states to "have in place . . . uniform standards for defining what counts as a vote").

335. *California Democratic Party*, 530 U.S. at 576 n.6:

An open primary differs from a blanket primary in that, although as in the blanket primary any person, regardless of party affiliation, may vote for a party's nominee, his choice is limited to that party's nominees for all offices. He may not, for example, support a Republican nominee for Governor and a Democratic nominee for attorney general.

*Id.*; see also Samuel Issacharoff, *Private Parties With Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 282-83 (2001) [hereinafter *Private Parties With Public Purposes*]; Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 785 n.155 (2001).

336. *California Democratic Party*, 530 U.S. at 577 n.8. Commentators have noted that the structural similarities between the open and blanket primaries leave the more widely used open primary subject to constitutional attack. See, e.g., Richard L. Hasen, *Point/Counterpoint: Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 830 n.60 (2001); Issacharoff, *Private Parties With Public Purposes*, *supra* note 335, at 284-85; Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 705-06 (2001). But see Elizabeth Garrett, *Law and Economics*, 31 N.M. L. REV. 107, 131 (2001) (noting that open primaries pose less of a threat to associational rights than do blanket primaries); *The Supreme Court, 1999 Term Leading Cases*, 114 HARV. L. REV. 259, 278 & n.78 (2000) (arguing that "open primaries appear to represent not a raid on the party by outsiders, but merely an extreme loosening of the requirements for affiliation with a party" and that this "affiliation, though temporary, was the touchstone for the *Jones* Court." (internal citations omitted)).

337. Cf. *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding congressional ban on literacy tests); *Lassiter v. Northhampton County Bd. Of Elections*, 360 U.S. 45 (1959) (upholding constitutionality of literacy test).

Clause a prohibition against districting plans in which race predominates over traditional districting principles, absent narrow tailoring to a compelling governmental interest.<sup>338</sup> And like *Bush v. Gore* and *California Democratic Party*, they limit congressional power while still preserving a realm for continued congressional action. The *Shaw* decisions block Congress from authorizing racially predominant districting absent a compelling justification, but nevertheless assume that compliance with the VRA constitutes a compelling interest.<sup>339</sup>

The *Shaw* decisions, *Bush v. Gore*, and *California Democratic Party*, accordingly all articulate constitutional holdings that restructure democratic governance at the state and local level while leaving to Congress at least some authority to develop related rules. Given that *Shaw* and its progeny directly implicate racial concerns while *Bush v. Gore* and *California Democratic Party* do not, these decisions collectively might suggest a degree of judicial receptivity to broad congressional regulation of state voting regimes, regardless of whether the local practices involve issues of racial representation.

To be sure, the *Shaw* decisions more expressly invite congressional participation in the federal project of reinforcing representation at the state level than do *Bush v. Gore* and *California Democratic Party*.<sup>340</sup> But this facet of *Shaw* and its progeny may stem simply from the fact that the state defendants in these cases expressly invoked the federal VRA as justification for their districting decisions, and thus may not signal greater congressional authority in the realm of race and the vote. If so, underlying the *Boerne* doctrine's preservation of the VRA precedent may be an as yet evolving theory that Congress has considerable leeway to devise measures influencing state voting and representational regimes even outside the race context. Indeed, *Boerne*'s affirmation of *Morgan*'s observation that state governments may be insufficiently responsive to those excluded from the political process suggests a willingness to defer to Congress when it acts to address such exclusions, regardless of whether racial discrimination is the cause.<sup>341</sup> Put differently, the Court's confidence in its own institutional competence to "constitutionalize democracy" does not necessarily preclude congressional power to legislate at the margins with prophylactic rules.

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338. See *supra* note 210 and accompanying text.

339. See *supra* note 210 and accompanying text.

340. See, e.g., *Bush v. Vera*, 517 U.S. 952, 977 (1996) (assuming *arguendo* that compliance with the Voting Rights Act can be a compelling state interest); *Shaw v. Hunt*, 517 U.S. 899, 915 (1996) (same).

341. See *City of Boerne v. Flores*, 521 U.S. 507, 528 (1997) (affirming *Morgan*'s "rational" upholding § 4(e) of the VRA on the ground that Congress may bar literacy tests as a mechanism to address discrimination in public services); see also *supra* notes and accompanying text and *infra* notes and accompanying text.

And yet, the *Shaw* decisions suggest that the Court is more receptive to congressional participation in regulating state political processes when Congress acts to address racial discrimination affecting voting rights. *Shaw* and its progeny suggest that Congress may authorize rules structuring the political process that the Court would deem unconstitutional if authorized by another governmental entity. *Bush v. Gore* and *California Democratic Party* do not appear to recognize a distinct congressional power of this sort. In this sense, these decisions suggest that Congress is entitled to more deference when it legislates in the realm of race and the vote than when it acts elsewhere.<sup>342</sup>

Such divergent receptivity appears puzzling. The warrant for exclusive judicial action defining rules of democratic participation seems strongest in cases involving both racial discrimination and the right to vote. After all, when racial discrimination affects the right to vote, it implicates two distinct grounds long thought independently to warrant rigorous judicial review.<sup>343</sup>

Insofar as the Court is more receptive to congressional power in this realm, the nature of the rules regarding which the Court looks to Congress offers an explanation. Rules governing political participation necessarily affect political outcomes. As a leading casebook explains, “the election process emerges from previously fixed — and often carefully orchestrated — institutional arrangements that influence the range of possible outcomes that formal elections and subsequent policymaking can achieve.”<sup>344</sup> But while all rules sounding in electoral “process” invariably shape substantive outcomes, only some rules predictably redistribute political spoils among identifiable groups. The Rehnquist Court may look to Congress to create the mechanisms needed to address racial discrimination in the political process because

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342. So too, the Court's decision in *Rice v. Cayetano*, 528 U.S. 495 (2000), implicitly preserves a realm for concurrent congressional action. *Rice* struck down as a violation of the Fifteenth Amendment a state law that provided that only “Hawaiians” could vote for trustees of the State's Office of Hawaiian Affairs (“OHA”), a public agency that oversees programs designed to benefit the State's native people. The Court held that the restriction limiting the OHA electorate to descendants of the 1778 inhabitants of the Hawaiian Islands embodied a racial classification that denied non-Hawaiians the right to vote within the meaning of the Fifteenth Amendment. See generally Ellen D. Katz, *Race and the Right to Vote After Rice v. Cayetano*, 99 MICH. L. REV. 491 (2000) (discussing *Rice*). *Rice* invalidates a state program that did not implicate the federal government's unique relationship and obligation toward its native people, and thus potentially leaves room for congressional action.

343. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (suggesting that courts should rigorously review “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” as well as conduct reflecting “prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities”).

344. ISSACHAROFF ET AL., *supra* note 24, at 1.

it views those mechanisms to be unavoidably outcome-based in this redistributive sense. That is, it may see these mechanisms not simply as procedural regulations, but as devices for deciding winners and losers within the political system. Electoral rules derived to address racial vote dilution, for example, purposefully shift political power to a discrete and identifiable group of voters.

By contrast, decisions such as *Bush v. Gore* and *California Democratic Party* articulate process-based holdings that less clearly redistribute political benefits to identifiable groups. For all the charges of partisanship *Bush v. Gore* generated,<sup>345</sup> the legal rule it announces — in contrast to the remedy it forecloses<sup>346</sup> — appears to be a neutral and objective one. More so than one-person, one-vote, the requirement that a uniform standard govern the assessment of recounted ballots does not facially favor any particular substantive outcome.<sup>347</sup> So too, even if, as its supporters contend, the blanket primary favors more moderate candidates, this result does not consistently redistribute power among identifiable groups in the same sense that racial vote dilution claims do.

#### IV. CONCLUSION: KEEPING A NONPLENARY POWER NONPLENARY

Recognition of congressional power to address racial discrimination in state political processes, if understood in functional terms, arguably demands recognition of congressional power to target political-process disruptions that transcend racial discrimination. In *United States v. Reese*, the Waite Court appeared to reject expressly the possibility that Congress may intervene in state political processes absent racial discrimination.<sup>348</sup> But by the time the Court decided *Yarborough*, the Waite Court appeared more receptive to that prospect, equating the corruption stemming from the “free use of money in elections” with the racially motivated “lawless violence . . . outrage,” and suggesting that both endanger good government.<sup>349</sup> This

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345. See, e.g., VINCENT BUGLIOSI, *THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT* (2001); ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1723-24 (2001); David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 738 (2001).

346. See, e.g., Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1429-31 (2001); Klarman, *supra* note 345, at 1732-34; Larry D. Kramer, *The Supreme Court 2000 Term — Foreword: We The Court*, 115 HARV. L. REV. 4, 152-57 (2001); Louise Weinberg, *When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 B.U. L. REV. 609, 630-35 (2002).

347. See Thomas L. Friedman, *Foreign Affairs: A Tally of Two Countries*, N.Y. TIMES, Dec. 12, 2000, at A33 (discussing the importance of uniform standard for recounts).

348. See *supra* note 45 and accompanying text.

349. See *Ex parte Yarborough*, 110 U.S. 651, 661 (1884).

observation implied previously unacknowledged congressional power, but the Waite Court ended before it could explore the doctrinal consequences. The Fuller Court that followed proved far less receptive to congressional action in the electoral arena.<sup>350</sup>

So too, the scope of the Rehnquist Court's deference to congressional action in the electoral arena remains unclear. The deference accorded Congress in the realm of race and the vote suggests deference of a broader sort to electoral regulation more generally. Recent decisions addressing the constitutional contours of democratic participation can be reconciled with such deference, but hardly establish it.<sup>351</sup> The extent of judicial deference to congressional power to regulate elections will be determined by future decisions by this Court, or its successor.

Existing precedent nevertheless makes clear that while extensive, Congress's power to block racial discrimination in voting is far from plenary. *Boerne* states that Congress may not expand the rights protected by Section 1 of the Fourteenth Amendment.<sup>352</sup> Thus, deference notwithstanding, the Court would not permit Congress to mandate a departure from the one-person, one-vote principle as a mechanism to remedy racial discrimination in the electoral process.<sup>353</sup> An attempt to authorize purely race-based districting, without regard to the existence of communities of interest, is likewise sure to fail. Even if the *Shaw* cases could be read to leave open the possibility that Congress retains such authority,<sup>354</sup> the Court would no doubt view congressional legislation of this sort to embody the type of race-conscious decisionmaking it understands the Equal Protection Clause to proscribe.<sup>355</sup>

Section 2 of the VRA will test the limits of the Court's deference to Congress's efforts to block racial discrimination in voting. As amended in 1982, section 2 prohibits any voting "standard, practice, or procedure" that "results in a denial or abridgement of the right . . . to vote on account of race or color."<sup>356</sup> The constitutionality of the statute is an open question.<sup>357</sup> In significant respects, section 2 resembles the

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350. See *James v. Bowman*, 190 U.S. 127 (1903); see also *supra* note 104.

351. See text following *supra* note 339.

352. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

353. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964) (construing the Equal Protection Clause to mandate equal apportionment among electoral districts).

354. See *infra* notes 207-210 and accompanying text.

355. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 926-27 (1995) (suggesting that if § 5 of the VRA authorized the Department of Justice's black-maximization policy, it would raise "serious constitutional concerns").

356. 42 U.S.C. § 1973(a) (1994).

357. Commentators dispute the validity of § 2 under the *Boerne* doctrine. Compare David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 45-46 (arguing that § 2 remains constitutional), and Karlan, *Two Section Twos and Two Section Fives*, *supra* note 136, at 726



statutory provisions the Court invalidated in *Boerne* and its progeny. As it did with RFRA,<sup>358</sup> Congress amended section 2 to “restore” a legal standard expressly rejected by the Court as not constitutionally mandated. Congress amended section 2 to create a results-based test for racial discrimination because it disagreed with *Mobile v. Bolden*, which construed the Fifteenth Amendment to proscribe intentional discrimination only.<sup>359</sup> Also like RFRA, section 2 is based on relatively sparse findings of intentional discrimination,<sup>360</sup> applies nationwide, has no termination date, and proscribes substantially more conduct than does the Constitution.<sup>361</sup>

None of these characteristics, however, appears problematic if the Court evaluates section 2 under the VRA precedent preserved in the *Boerne* decisions and with the deference accorded in *Lopez*.<sup>362</sup> Indeed, in 1982, the adequacy of congressional authority to adopt a results-based test for racial discrimination after *Mobile* prompted relatively little discussion.<sup>363</sup> The five pages the Senate Report devoted to the subject invoke the VRA precedent later preserved in the *Boerne* cases.<sup>364</sup> They attest to congressional authority to enact measures “going beyond”

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(same), and Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2544 (1998) (same), and Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 132-35 (2000) (same), with Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 749-50 (1998) (noting that “[t]he political history of the 1982 [Amendments to § 2 of the VRA], and the structural relationship of the statutory and constitutional standards, are indistinguishable from RFRA”), and Guard, *Impotent Figureheads*, *supra* note 156 (arguing that § 2 cannot be distinguished from the statutes invalidated under *Boerne*). See also SAMUEL ISSACHAROFF ET AL., *supra* note 24, at 859-66; Erwin Chemerinsky, *The Rehnquist Court and Justice: An Oxymoron*, 1 WASH. U. J.L. & POL’Y 37, 38 (1999); Gerken, *supra* note 222, at 1736-37.

358. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (RFRA was enacted to “overrule” *Employment Division v. Smith*).

359. See *City of Mobile v. Bolden*, 446 U.S. 55 (1980); S. REP. NO. 97-417 (1982). As originally enacted, § 2 of the VRA tracked the language of the Fifteenth Amendment, and thus was thought to add nothing to the constitutional prohibition itself. See *Chisom v. Roemer*, 501 U.S. 380, 392 (1991) (Section 2 as originally enacted “was unquestionably coextensive with the coverage provided by the Fifteenth Amendment”); Guard, *Impotent Figureheads*, *supra* note 156; *Mobile*, 446 U.S. at 60-61 (“[I]t is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, . . . [and] that it was intended to have an effect no different from that of the Fifteenth Amendment itself.”); see also ISSACHAROFF ET AL., *supra* note 24.

360. Compare S. REP. NO. 97-417, with *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), and *United States v. Morrison*, 529 U.S. 598 (2000) (rejecting as inadequate lengthy congressional findings).

361. See *supra* notes 221-222.

362. See Karlan, *Two Section Twos and Two Section Fives*, *supra* note 136; see also *supra* notes and accompanying text.

363. But see Joan F. Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial “Intent” and Legislative “Results” Standards*, 50 GEO. WASH. L. REV. 689, 739-52 (1982).

364. S. REP. NO. 97-417, at 39-43 & n.149.

direct constitutional requirements so long as such measures are “appropriate and reasonably adapted to protect citizens” from a constitutional violation.<sup>365</sup> The results test was so adapted, the Report continued, given the difficulties plaintiffs encounter in proving discriminatory intent on a case-by-case basis, and the fact that practices that violate the results test “perpetuate the effects of past purposeful discrimination.”<sup>366</sup> At the time, the Court did not even deem the question of congressional authority worthy of full consideration and summarily affirmed a lower-court decision that held the amended statute to be appropriate enforcement legislation.<sup>367</sup> In recent years, however, individual justices have raised questions about section 2’s validity.<sup>368</sup>

Section 2’s survival accordingly depends on whether the Court thinks the statute better resembles the VRA provisions upheld in the VRA precedent and *Lopez* than it does the statutory provisions challenged in the *Boerne* decisions. A functional understanding of congressional power to block racial discrimination in voting would permit the Court to deem section 2 appropriate enforcement legislation.

The Court may, however, be unwilling to do so. If understood in purely functional terms, the Court’s preservation of the VRA precedent in the *Boerne* cases and its affirmance of the VRA in *Lopez v. Monterey County* suggest a congressional power that is potentially quite expansive. Preserving state primacy to protect individual rights through the regulation of the political process logically encompasses more than the corruption caused by racial discrimination. But even if the task were so limited, the realm in which racial discrimination corrupts political processes is not naturally circumscribed. What constitutes a racial classification is itself a contested question,<sup>369</sup> while the conduct that affects political processes is neither self-evident nor necessarily bounded.<sup>370</sup> The Court may well find

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365. *Id.* at 40.

366. *Id.*

367. *Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984) (affirming *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss. 1984)); *United States v. Marengo County Comm’n*, 731 F.2d 1546, 1556-63 (11th Cir. 1984); *Jones v. Lubbock*, 727 F.2d 364, 372-75 (5th Cir. 1984); *Major v. Treen*, 574 F. Supp. 325, 342-49 (E.D. La. 1983).

368. See *Bush v. Vera*, 517 U.S. 952, 992 (1996) (O’Connor, J., concurring) (noting that the Court has “assume[ed], but never directly address[ed]” the constitutionality of § 2 and that § 2 is to be assumed constitutional “unless and until current lower court precedent is reversed and it is held unconstitutional”); *Johnson v. DeGrandy*, 512 U.S. 997, 1028-29 (1994) (Kennedy, J., concurring); *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) (writing separately to emphasize decision is one of statutory interpretation and that “[n]othing in today’s decision addresses the question whether § 2 . . . is consistent with the requirements of the United States Constitution”).

369. See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 512 (2000) (stating that not all classifications based on ancestry are race based, but the one before the Court is).

370. See, e.g., Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002); Lawsky, *supra* note 96, at 786 (arguing that VAWA is a valid enactment under the Nineteenth Amendment because politi-

that the seemingly limited realm in which it presently defers to congressional action is not so limited at all.

Indeed, the Court may already think so. The Court has recently insisted that the Fifteenth Amendment does not proscribe racial vote dilution,<sup>371</sup> a claim that largely eliminates the Amendment as a source for congressional authority to enact section 2 of the VRA. Locating the proscription against racial vote dilution solely within the Fourteenth Amendment should be of no consequence if, in fact, Congress's enforcement powers under the Fourteenth and Fifteenth Amendments are "coextensive."<sup>372</sup> The Court, however, may be moving toward distinguishing the two powers in order to narrow the realm in which it will defer to congressional action.

The Court's goal may be to accord deference only when Congress legislates pursuant to the Fifteenth Amendment. Such a move would repudiate considerable precedent<sup>373</sup> and largely abandon the functional understanding of Congress's enforcement powers that has marked the Court's approach to date. If the Court adheres to its recent claim that intentional vote dilution does not deny or abridge the right to vote within the meaning of the Fifteenth Amendment, it would mean the demise of section 2 of the VRA. By both limiting its deferential stance to the Fifteenth Amendment and excluding racial vote dilution from that Amendment's ambit, the Court would almost certainly render section 2, with its proscription against such dilution, invalid under the *Boerne* precedent. To be sure, the Court would still confront occasional claims of intentional racial vote dilution brought directly under the Fourteenth Amendment.<sup>374</sup> Eliminated would be the far more numerous result-based dilution claims now brought under Section 2.

Distinguishing congressional power under the Fourteenth and Fifteenth Amendments evokes the approach taken by Justice Kennedy's plurality opinion in *Presley v. Etowah County Commission*<sup>375</sup> to limit the reach of the VRA. *Presley* holds that laws altering the powers exercised by elected county commissioners are not changes "with respect to voting" under section 5 of the VRA and accordingly not changes for which preclearance is required. Justice Kennedy's opinion insists that laws "with respect to voting" may be distinguished from the operational provisions that render local governance possible.<sup>376</sup> The distinction is a

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cal citizenship "requires the ability to participate, free from domination, as a self-determined individual").

371. See *Bossier Parish II*, *supra* note 30, 528 U.S. 320 (2000) (stating that the Fifteenth Amendment does not proscribe vote dilution).

372. See *supra* note 253 and accompanying text.

373. See *supra* note 253 and accompanying text.

374. See *White v. Regester*, 412 U.S. 755 (1973); Gerken, *supra* note 222, at 1737.

375. 502 U.S. 491 (1992).

376. See *Presley*, 502 U.S. at 494; *supra* note 239 and accompanying text.

formal one that is difficult to defend in functional terms, or to reconcile with the precedent.<sup>377</sup> Instead, it reflects the perception that the VRA was not meant to supplant local governance entirely. The Court thought a line needed to be drawn and accordingly drew it.<sup>378</sup>

The Court might similarly distinguish between Congress's enforcement powers under the Fourteenth and Fifteenth Amendments in order to narrow the realm in which it will defer to congressional judgments. But even if the Court adheres to precedent and retains its view that Congress's powers under the Fourteenth and Fifteenth Amendments are coextensive, section 2 of the VRA remains vulnerable. The Court may well be uneasy with the manner in which Congress exercises its power to address racial discrimination within the political process. Critics of John Hart Ely's argument that courts should police and cure defects within political processes charge that the endeavor is impossible absent an outcome-based view of what the political process should produce.<sup>379</sup> Absent such a view, the argument goes, courts will have no way of knowing whether the political process is failing. The same, of course, may be said about congressional efforts to reinforce representative governance at the local level. Such efforts might as easily be creating defects in the political process as curing them.

Equality in the political process is no more easily defined than equality in political outcomes. The formal equality to make contracts and own property hardly gives rise to equality in wealth or business opportunity. So too, formal equality to cast a ballot — indeed, even an undiluted ballot — does little to ensure equality in the distribution of political resources like money and incumbency.<sup>380</sup> Efforts to rectify either practi-

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377. A law that replaces an elected office with an appointed one is arguably a change "with respect to voting" because voters no longer influence a decision they previously controlled. See *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). A law that diminishes the powers exercised by an elected officials arguably implicates a similar interest.

378. See *Presley*, 502 U.S. at 509 (stating that "[t]he Voting Rights Act is not an all-purpose antidiscrimination statute.").

379. See, e.g., Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981) (arguing that "most instances of representation-reinforcing review demand value judgments not different in kind or scope from the fundamental values sort . . . [and] the parties' claims in fundamental values case are often directly translatable into representation-reinforcing claims"); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) ("[T]he constitutional theme of perfecting the processes of governmental decisions . . . by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values — the very sort of theory the process-perfecters are at such pains to avoid."); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045 (1980) ("[I]dentifying functional obstacles [to the assertion of political power] both permits manipulation, which violates the restraint principle, and requires the use of objective values."). See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

380. See, e.g., Spencer Overton, *Racial Disparities and the Political Function of Property*, 49 UCLA L. REV. 1553 (2002).

cal inequality may offend the formal equality in each context.<sup>381</sup> Redistributing wealth threatens interference with contract or property rights while creating special districts or increasing the number of votes cast by the politically disadvantaged arguably conflicts with formal political equality.

Such concerns may lead the Court to extend the constitutionalization of democratic governance employed in cases like *Bush v. Gore* and *California Democratic Party*. Most dramatically, the Court could hold that the substantive dictates of the Equal Protection Clause bar the race-consciousness that inheres in section 2's ban on discriminatory results and indeed in any law barring racially discriminatory effects. Such prohibitions require those governed by them to consider race expressly or risk violating the proscription.<sup>382</sup> Decreeing the Fourteenth Amendment to proscribe such considerations would overrule considerable precedent,<sup>383</sup> and invalidate numerous civil-rights measures.<sup>384</sup> It would constrict Congress's enforcement powers to unprecedented levels.

The acceptance of race-conscious decisionmaking evident in several recent decisions suggests the Court is unlikely to hand down such a sweeping decision. Even so, other decisions energetically locate within the Constitution's text substantive norms dictating specific democratic structures. These newly articulated constitutional rules suggest a mechanism to limit congressional regulatory power over the political process. Novel constructions of the Equal Protection Clause that constrict such power are accordingly not implausible. The "constitutionalization of democracy" may well be an ill-advised institutional endeavor in its own right.<sup>385</sup> As a vehicle for limiting congressional power, it threatens to obliterate it entirely.

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381. Cf. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 884 (1987) (arguing that in both *Lochner* and *Buckley* "the existing distribution of wealth is seen as natural, and failure to act is treated as no decision at all. Neutrality is inaction, reflected in a refusal to intervene in markets or to alter the existing distribution of wealth").

382. See, e.g., Katz, *Federalism, Preclearance, and the Rehnquist Court*, *supra* note 144, at 1205 (making this point); Lowenstein, *supra* note 144, at 825 (noting that under both § 2 and § 5 of VRA "race is a privileged criterion" and that "[t]he legislature and everyone who participates in the process must begin with race"); Erickson, *supra* note 144, at 421.

383. See, e.g., *Hunt v. Cromartie*, 531 U.S. 977 (2000); *Lopez v. Monterey County*, 525 U.S. 266 (1999).

384. See, e.g., *Ragin v. N.Y. Times*, 923 F.2d 995, 1000, 1001 (2d Cir. 1991) (discussing how Fair Housing Act's effect-based ban on racial preference in advertisements permissibly leads to race-conscious decisionmaking).

385. See Pildes, *Constitutionalizing Democratic Politics*, *supra* note 328, at 159.